LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
FEB 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 701, Oct. T. 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

On Appeal From the United States District Court for the District of Columbia

No. 713, Oct. T. 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*,

v.

WALTER KRUEGER

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF ON REHEARING ON BEHALF OF APPELLEE AND RESPONDENT

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Ave., N. W.,
Washington 6, D. C.,

Counsel for Appellee and Respondent.

JOHN C. MORRISON,
305 Morrison Building,
Charleston 24, W. Va.,
ADAM RICHMOND,
7816 Glenbrook Road,
Bethesda 14, Maryland,
Of Counsel for the Respondent.

INDEX

Page

Introductory Statement 1

Summary of Argument 2

Argument 10

I. The consent of England and Japan to the exercise of American military jurisdiction within their territories in respect of offenses committed therein did not and could not invest American courts-martial with jurisdiction to try particular persons 16

A. The territorial sovereign does not confer jurisdiction on the personal sovereign, but simply consents to the personal sovereign's exercise of jurisdiction, and the scope of the latter's jurisdiction depends, not on the territorial sovereign's consent, but on the personal sovereign's law 16

B. The American military jurisdiction asserted in the present case did not purport to be conditional, but was rested on an assumed American power 20

C. If, as a matter of American law, including American constitutional law, American courts-martial have no jurisdiction to try particular civilians, such courts-martial cannot by treaty or international agreement be given a wider jurisdiction, for the reason that no treaty can prevail over specific constitutional guarantees, in this instance the right to trial by jury 26

II. Nothing in the Constitution of the United States authorizes the trial of civilians by court-martial in time of peace and not in occupied territory 30

A. The power to govern the armed forces does not confer any power to court-martial civilians in time of peace 31

1. One hundred and seventy-five years of American history and experience, closely carrying forward the English heritage, establish that, outside of occupied territory where the laws of war apply, the only civilians who may constitutionally be tried by court-martial are those now included in Art. 2(10), UCMJ, viz., those who in time of war accompany the armed forces in the field 31

Page

2. Nothing in the Necessary and Proper Clause, either as a matter of construction or of application over the years, enlarges the scope of "land and naval Forces" in Clause 14, essentially because any such enlargement would necessarily and improperly restrict the class of persons falling within the dual constitutional guarantee of jury trial ... 45

3. Significantly enough, the power purportedly conferred by Art. 2(11), UCMJ, under which the present prosecutions were instituted, has never been sought to be constitutionally justified in any legislative discussion, and was not rested on Clause 14, with or without Clause 18, in this Court's opinion last June ... 54

4. Since civilian dependents cannot be tried by court-martial in the United States although members of the armed forces can be, the present assertion of power must rest on the untenable proposition that a civilian dependent accompanying the armed forces overseas loses his or her civilian status ... 58

B. The now abolished consular jurisdiction does not support the present trials by court-martial ... 63

1. The only possible basis for sustaining the non-jury aspect of the consular jurisdiction, long moribund and now abolished, would be that it predated the Constitution, and is thus impliedly excepted from the guarantee of jury trial ... 64

2. Unlike consular jurisdiction, which rested on express treaty provisions, extraterritorial jurisdiction over military personnel flows, so the United States long contended, from accepted doctrines of international law ... 71

C. The courts-martial here involved cannot be sustained as legislative courts ... 80

1. Prior to June, 1956, a court-martial was never considered to be a legislative court ... 81

2. A court-martial is an executive rather than a legislative court since its judgments are inchoate until reviewed and acted upon by an executive officer ... 83

3. To speak of courts-martial as legislative courts does not settle the question of Congressional power but simply obscures it ... 86

Page

4 The circumstance that a particular tribunal is a legislative, rather than a constitutional court does not automatically dispense with the requirement of a jury trial in criminal cases 87

5 The doctrine of legislative courts does not justify depriving American civilians of the right to bail, which is a necessary consequence of subjecting them to military jurisdiction 94

D No other power or combination of powers conferred by the Constitution supports the asserted jurisdiction 97

1 The war power is both irrelevant and unavailing in the present cases 97

2 Considerations based on Article IV, section 3 are similarly irrelevant 99

3 No combination of powers, each one of which is insufficient by itself, can authorize the present trials 100

E The court-martial jurisdiction exercised in the present cases cannot be sustained apart from the power to govern the armed forces 101

1 Absent the Clause 14 power, no law made criminal the acts for which these women were tried, a feature that plainly distinguishes the *Ross* case 102

2 Only Clause 14 supports the broad delegation to the President to regulate the procedure of courts-martial, to prescribe rules of evidence, to define offenses, and to determine the elements of criminality at military law 106

3 If Congress can subject these women to trial by court-martial in time of peace, it is not bound to extend to them the present statutory safeguards 110

4 The military considerations adduced are relevant only to the Clause 14 power 116

5 Not until these cases were on appeal were the present trials by court-martial sought to be justified by any power other than that conferred by Clause 14 118

F Military trial of civilians is utterly foreign to the American tradition 120

Page

III. The result reached last June is completely irreconcilable with *Toth v. Quarles*, 350 U.S. 11 134

A. Every consideration relied on in the present cases would have supported Toth's trial by court-martial 134

B. Toth's separation from the service prior to the discovery of his offense would not, under established extraterritorial doctrines, have varied the result under the rationale of last June's opinions 136

IV. As long as the object sought to be attained is punishment of crime rather than military control of civilians, practical alternatives are available 137

V. These are not cases involving questions of substantive due process where "practical necessities" are relevant to measure constitutionality, and the materials adduced are moreover not of a nature that can safely be relied upon as a foundation for judicial action 138

A. If, as the Government contends, there is an impelling military reason why overseas commanders must command, control, and punish civilian employees, then the obvious solution, which is plainly constitutional and which has not been shown to be impractical, is to employ only military personnel for overseas military duties 142

B. There is no showing that the incidence of crime on the part of civilian dependents, as distinguished from civilian employees, is a problem of any magnitude, and moreover the United States under the NATO and NATO-type agreements has yielded primary jurisdiction to the receiving states over all criminal offenses committed by dependents 146

C. Ample practical means are available to punish crimes committed abroad by civilian dependents of American servicemen 153

D. There is no constitutional difference between civilian employees and civilian dependents in time of peace 157

E. There is no constitutional distinction, with respect to court-martial jurisdiction, between major crimes and petty offenses 159

Page

V—In any event, Mrs. Covert cannot now be tried by court-martial in the District of Columbia 160

A. The military rule has always been that military jurisdiction ceases when military status is terminated by affirmative act of the Government 161

B. Placing Mrs. Covert in civilian custody precluded the exercise of further military jurisdiction over her by the very terms of the Uniform Code 164

C. The rationale of last June's opinion in the *Krueger* case, sustaining military trials of accompanying civilians overseas, is patently insufficient to sustain the *Covert* holding that such a trial is proper in the District of Columbia 166

Conclusion 168

AUTHORITIES

Judicial Decisions

Abrams v. United States, 250 U.S. 616 52
Adamson v. California, 332 U.S. 46 139
American Ins. Co. v. Canter, 1 Pet. 511 87, 88, 100, 131
Andres v. United States, 333 U.S. 740 50
Application of I. R. & W. 127, 238 F. 2d 163 88
Ex parte Bakelite Corp., 279 U.S. 438 8, 82, 83, 87
Balzac v. Porto Rico, 258 U.S. 298 6, 8, 68, 89, 90, 92, 94, 95
Banner v. Porter, 9 How. 235 88
Biddle v. United States, 156 Fed. 759 103
Blackmer v. United States, 284 U.S. 421 59
Board of Education v. Barnette, 319 U.S. 624 115
Brock v. North Carolina, 344 U.S. 424 139
Burns v. Wilson, 346 U.S. 137, 346 U.S. 844 115
Burrow-Giles Co. v. Sarony, 111 U.S. 53 42
Callan v. Wilson, 127 U.S. 540 42, 50, 166
Carter v. Gear, 197 U.S. 348 91
The Cherokee Tobacco, 11 Wall. 616 27
Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103 160
Chung Chi Cheung v. The King, [1939] A.C. 160 72, 73
Coleman v. Tennessee, 97 U.S. 509 72, 134
Cole v. Corn Exchange Bank, 250 N.Y. 136, 164 N.E. 882 42
Crawford v. United States, 212 U.S. 183 140
Crowell v. Benson, 285 U.S. 22 131

	Page
In re Debs, 158 U.S. 564	42, 70, 90
Debs v. United States, 249 U.S. 211	52
De Geofroy v. United States, 5 Wall. 419	83, 84
District of Columbia v. Clawans, 300 U.S. 617	42, 70, 90, 140, 166
District of Columbia v. Colts, 282 U.S. 63	42, 50, 140, 166
Dorr v. United States, 195 U.S. 138	8, 31, 90, 93, 95
Dow v. Johnson, 100 U.S. 158	72, 134
Duncan v. Kahanamoku, 327 U.S. 304	4, 9, 11, 42, 98, 99, 125, 141
Ex parte Falls, 251 Fed. 415	98
Frohwerk v. United States, 249 U.S. 204	52
Geofroy v. Riggs, 133 U.S. 258	27
Ex parte Gerlach, 247 Fed. 616	98
In re Gillis, 38 Wash. 156, 80 Pac. 300	137
Gompers v. United States, 233 U.S. 604	32
Gordon v. United States, 2 Wall. 561, 117 U.S. 697	84
Grafton v. United States, 206 U.S. 333	90, 96
The Grapeshot, 9 Wall. 129	86
Graves v. O'Keefe, 306 U.S. 466	31
Hampton & Co. v. United States, 276 U.S. 394	42
Hatchett v. Government of Guam, 212 F.2d 767, appeal dismissed, 348 U.S. 891	96
Hawaii v. Mankichi, 190 U.S. 197	8, 90, 93, 95
Hines v. Davidowitz, 312 U.S. 52	100
Hines v. Mikell, 259 Fed. 28, certiorari denied, 250 U.S. 645	98, 99
Hirabayashi v. United States, 320 U.S. 81	138
Holden v. Joy, 17 Wall. 211	27
Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398	138
Hurtado v. California, 110 U.S. 516	139
Ide v. United States, 150 U.S. 517	84
Ex parte Jochen, 259 Fed. 200	98, 99
Johnson v. Sayre, 158 U.S. 109	50
Johnson v. Zerbst, 304 U.S. 458	114
Jones v. United States, 137 U.S. 202	59
Jordan v. Massachusetts, 225 U.S. 167	139
Kawakita v. United States, 343 U.S. 717	59
Keller v. Potomac Elec. Power Co., 261 U.S. 428	83
Keller v. United States, 213 U.S. 138	52
Ex parte Kent, 323 U.S. 672	153
Tyler Gatewood Kent, 28 Ct. App. R. 23	153
Kepner v. United States, 195 U.S. 100	96, 112
Ker v. Illinois, 119 U.S. 436	134
Knowlton v. Moore, 178 U.S. 41	50
Korematsu v. United States, 323 U.S. 214	138
Ex parte Krause, 228 Fed. 547	137
Krivoski v. United States, 145 F. Supp. 239, certiorari denied, 352 U.S. 954	115

	Page
Leary v. Deaton, 47 F. Supp. 590	114
Lichter v. United States, 334 U.S. 742	108
Madsen v. Kinsella, 343 U.S. 341	40, 41, 120, 126, 158
Mahon v. Justice, 127 U.S. 700	114
In the Matter of Manbeau, 11 U.S. (7 Cranch) 208	92
Martin v. Hunter's Lessee, 1 Wheat. 304	80
Matter of Martin, 45 Barb. 142, 30 How. Pr. 118	102
Maxwell v. Dow, 176 U.S. 581	139
McAllister v. United States, 141 U.S. 174	88
Ex parte McCardle, 6 Wall. 318	123
Ex parte McCardle, 7 Wall. 506	123
M'Culloch v. Maryland, 4 Wheat. 316	4, 47, 51, 53, 108
McKinley v. United States, 249 U.S. 397	81
Ex parte Milligan, 4 Wall. 2, 4, 9, 11, 20, 42, 46, 60, 120, 121, 124, 142	
Missouri v. Holland, 252 U.S. 416	52
Ex parte Morgan, 20 Fed. 298	136
Muller v. Oregon, 208 U.S. 412	141
Murray v. Hoboken Land &c. Co., 18 How. 272	42
Neely v. Henkel, 180 U.S. 109	15
O'Donoghue v. United States, 289 U.S. 516	2, 156, 167
Old Colony Trust Co. v. Commissioner, 279 U.S. 716	81
Orloff v. Willoughby, 345 U.S. 83	147
Owings v. Speed, 5 Wheat. 420	72
Palko v. Connecticut, 302 U.S. 319	139
Patton v. United States, 281 U.S. 276	40
Pennington v. Government of Guam, 338 F. 2d 8	96
Pettibone v. Nichols, 203 U.S. 192	144
Pope v. United States, 323 U.S. 1	84
Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693	82
Prout v. Starr, 188 U.S. 537	50
Puerto Rico v. Shell Co., 302 U.S. 253	96
Pugh v. United States, 212 F. 2d 761	96
Putty v. United States, 220 F. 2d 473, certiorari denied, 350 U.S. 821	96
Ex parte Quirin, 317 U.S. 1	31, 39, 42, 70, 90, 140
Rassmussen v. United States, 197 U.S. 516	8, 50, 57, 58
Ex parte Reed, 100 U.S. 13	111
Reference re Exemption of U.S. Forces from Canadian Criminal Law, [1943] S.C.R. 483, [1944] 4 D.L.R. 11	56
Republic of Hawaii v. Edwards, 11 Haw. 571	92
Republic of Panama v. Cheek, 21 Am. J. Int. L. 182	72
Reynolds v. United States, 98 U.S. 145	89
In re Ross, 140 U.S. 453	6, 15, 63, 68, 71, 89, 90, 102, 103, 116, 156, 167
Rubenstein v. Wilson, 212 F. 2d 631	146
Runkle v. United States, 19 Ct. Cls. 396, reversed on other grounds, 122 U.S. 543	82
Runkle v. United States, 122 U.S. 543	84

	Page
In re Sanborn, 148 U S 222	84
Santiago v Nogueras, 214 U S 260	80
Schaefer v United States, 251 U S 466	52
Schenck v United States, 249 U S 47	52
The Schooner Exchange v M'Faddon, 7 Cranch 116	7, 71, 72
Seltzer v United States, 98 C Cls 554	107
Stuart v Laird, 1 Cranch 299	42
Swaim v United States, 28d C Cls 173	108, 111
Swaim v United States, 165 U S 553	107, 111, 112
Talbott v United States, 215 F 2d 22	134
Thompson v Utah, 170 U S 343	50
Toth v Quarles, 350 U S 11	3, 4, 11, 12, 19, 20, 23, 35, 42, 54-57, 109, 117, 119, 126, 127, 130, 134, 137, 141,
Toth v Talbott, 113 F Supp 330	134
Toth v Talbott, 114 F Supp 468	134
Truitt v United States, 38 C Cls 308	107
Twining v New Jersey, 211 U S 78	139
United States v Belmont, 301 U S 324	68
United States v Bowman, 260 U S 94	50
United States v Capps, 348 U S 296	28
United States v Classic, 313 U S 299	11, 133
United States v Cox, 155 U S 76	83
United States v Cooke, 336 U S 210	144, 163
United States v Coolidge, 1 Wheat 415	106
United States v Curtiss Wright Corp, 299 U S 304	28, 68
United States v Fisher, 109 U S 143	88
United States v Fletcher, 148 U S 84	84
United States v Flores, 289 U S 137	2, 17, 20, 69, 79, 103, 154
United States v Fullard-Leo, 331 U S 256	91
United States v Hendee, 124 U S 309	50
United States v Hudson, 7 Cranch 32	106
United States v Lanza, 260 U S 377	90
United States v Maro, 27 F 2d 518	154
United States v Page, 137 U S 673	84
United States v Pink, 315 U S 203	68
United States v Plenty Horses, Winthrop 1212	135
United States v Rodgers, 150 U S 249	18, 19, 102
United States v Waltberger, 3 Wash C C 515, Fed Case No. 16738	18, 69
United States v Waltberger, 3 Wheat 76	3, 19, 20, 69, 102, 117, 154
United States v Wood, 299 U S 123	140
United States ex rel Mobley v Handy, 176 F 2d 491, certiorari denied, 338 U S 904	137, 161
Ex parte Vallandigham, Fed Case No 16816	123
Ex parte Vallandigham, 1 Wall 243	86, 123
In re Vidal, 179 U S 126	86
Wade v Hunter, 336 U S 684	85, 112

	Page
Warring v. United States, 12 C Cls 336	107
Weems v. United States, 217 U.S. 349	96
Weller v. United States, 41 C Cls 324	107
Wetsch'el v. McDonald, 340 U.S. 422	42, 59, 90
Widenhaus's Case, 120 U.S. 1	17, 18
Williams v. United States, 289 U.S. 553	82, 84, 88
Wilson v. New, 243 U.S. 332	138
Wolf v. Colorado, 338 U.S. 25	139
Wolton v. Gavin, 16 QB 48	33
Ex parte Yerger, 8 Wall. 85	124

U. S. COURT OF MILITARY APPEALS DECISIONS

(Indexed by name of accused)

Brilhart, review denied, 6 USCMA 808	20
Clay, 1 USCMA 74, 1 CMR 74	114
Garcia, 5 USCMA 88, 17 CMR 88	146
Robertson, 5 USCMA 806, 19 CMR 102	26, 149
Rubenstein, No. 7228, Jan. 25, 1957	102
St. Clair, 7 USCMA 82, 21 CMR 208	101, 149, 152
Sippel, 4 USCMA 50, 15 CMR 50	162, 163
Weiman, 3 USCMA 216, 11 CMR 216	26

CONSTITUTION OF THE UNITED STATES

Art. I, Sec. 8	
Clause 3, Commerce Clause	48
Clause 12, Army Clause	122
Clause 14	4, 8, 11, 36, 43, 45-47, 50, 53, 57, 58, 87, 102, 104-106, 108, 115, 118, 126, 166
Clause 18	4, 5, 11, 43, 45-47, 50-54, 57, 58, 124
Art. II, Sec. 2	107, 108
Art. III	15, 83, 86, 87, 131, 135, 159, 166, 167
Art. III, Sec. 2	17, 45, 50, 51, 90, 154, 163
Art. IV, Sec. 3	9, 99, 100
First Amendment	52
Fourth Amendment	19, 114
Fifth Amendment	10, 48, 114, 126
Sixth Amendment	6, 50, 51, 98, 154, 163
Eighth Amendment	95
Fourteenth Amendment	139

Page

Other Organic Laws of the United States

Declaration of Independence 121
Articles of Confederation, Art. IX 36

Statutes

(1) Acts by Date and Name

Act of Sept. 29, 1789, c. 25, 1 Stat. 95 ..... 37, 46
Act of Apr. 30, 1790, c. 10, 1 Stat. 119 ..... 37, 46
Act of Feb. 12, 1793, c. 7, 1 Stat. 302 136
Act of March 16, 1802, c. 9, 2 Stat. 132 49
Act of March 3, 1825, c. 65, 4 Stat. 115 19
Act of June 21, 1860, c. 163, 12 Stat. 64 48
Act of March 3, 1863, c. 79, 12 Stat. 244 48
Act of Apr. 12, 1900, c. 191, 31 Stat. 77 91
Act of June 6, 1900, c. 793, 31 Stat. 656 137
Act of Feb. 2, 1901, c. 192, 31 Stat. 748 49
Act of July 1, 1902, c. 1369, 32 Stat. 691 ..... 91, 95
Act of July 18, 1914, c. 186, 38 Stat. 514 48
Act of Aug. 29, 1916, c. 416, 39 Stat. 545 95
Act of March 2, 1917, c. 145, 39 Stat. 951 95
Act of July 9, 1918, c. 143, 40 Stat. 845 49
Act of July 11, 1919, c. 8, 41 Stat. 104 48
Act of May 14, 1942, c. 312, 56 Stat. 278 49
Act of July 1, 1943, c. 187, 57 Stat. 371 49
Act of June 12, 1948, c. 449, 62 Stat. 356 49
Jt. Res. of July 3, 1952, c. 567, 66 Stat. 327 95
Act of July 28, 1953, c. 253, 67 Stat. 226 83
Act of Aug. 1, 1956, Pub. L. 856, 84th Cong., 70 Stat. 773 66
Act of Aug. 1, 1956, Pub. L. 896, 84th Cong., 70 Stat. 905 89
Act of Aug. 10, 1956, Pub. L. 1028, 84th Cong., 70A Stat. 1 85
Army-Navy Nurses Act of April 16, 1947, c. 38, 61 Stat. 41 49

Criminal Code of 1909:

§ 272 ..... 17, 102
§ 273 102
§ 275 102
§ 276 18

Defense Appropriation Act of June 30, 1954, C. 432, 68 Stat. 337 ..... 143, 145
Doctors' Draft Act 147

Espionage Act 52
Hawaiian Organic Act of 1900, c. 339, 31 Stat. 141 91
See 81. 91
See 83 94

Judicial Code, § 41 103
National Security Act of 1947, c. 343, 61 Stat. 495 49
Reconstruction Acts of 1867 123

Revised Statutes:

§ 730 103
§ 1342 54
§ 5278 136
§ 5339 9, 102, 167
§ 5346 18

Service Courts of Friendly Foreign Forces Act, 1944, 58 Stat. 643 76

United States Code,

(exclusive of cross-references to UCMJ,
old Title 50, new Title 10:

10 U.S.C. § 4022(a) 147
18 U.S.C. § 7 17, 50, 102
18 U.S.C. § 113 18
18 U.S.C. § 1111 60, 102
18 U.S.C. § 1507 142
18 U.S.C. § 3182 136
18 U.S.C. § 3185 137
18 U.S.C. § 3238 60, 103, 154
22 U.S.C. §§ 701-706 76
26 U.S.C. § 7441 86
28 U.S.C. § 171 83
28 U.S.C. § 460 88
40 U.S.C. §§ 13f-13p 142
48 U.S.C. § 101 88
48 U.S.C. § 103a 88
48 U.S.C. § 112 88
48 U.S.C. § 631 91
48 U.S.C. § 635 94

Articles of War

1775 (2 J. Cont Cong. 111)
Art. XXXII 36

1776 (5 J. Cont Cong. 788)
See: XIII, Art. 23 33, 36

Page

1806 (Act of April 10, 1806, 2 Stat. 359)
AW 39 36

1874 (R. S. § 1342)
AW 63 ..... 36, 40, 54

1916 (Sec. 3, Act of Aug. 29, 1916, 39 Stat. 619, 650)
AW 2(d) 21, 55, 81, 114, 124
AW 2(e) 41, 165
AW 12 35
AW 32 105
AW 48 113
AW 81 105
AW 82 105

1920 (Ch. II, Act of June 4, 1920, 41 Stat. 759, 787)
AW 12 35
AW 32 105
AW 40 112
AW 48 105
AW 81, AW 82 105

1948 (Tit. II, Act of June 24, 1948, 62 Stat. 604, 627)
AW 12 35
AW 32 105
AW 81 105
AW 82 105

(4) Uniform Code of Military Justice (Act of May 5, 1950, 64 Stat. 108, formerly 50 U.S.C. §§ 551-736; chap. 47, Act of Aug. 10, 1956, 70A Stat. 36, 10 U.S.C. §§ 801-940)
Art. 2(7) 15, 165, 166
Art. 2(10) 31, 35, 97
Art. 2(11) 3, 14, 15, 21, 22, 25, 26, 54, 57, 81, 89, 97, 101, 104, 116, 118, 126, 135, 136, 161, 163
Art. 2(12) 22, 23, 89
Art. 3(a) 23, 35, 135, 166
Art. 18 35
Art. 36(a) 10, 107
Art. 44(c) 86
Art. 47 105
Art. 48 105
Art. 56 109
Art. 60 84
Art. 64 84
Art. 67(b)(1) 85
Art. 71 ..... 85, 165
Art. 74(b) 85
Art. 83 105

Page

Art. 85 ..... 62, 105
Art. 86 105
Art. 88 105
Art. 91 105
Art. 99 105
Art. 104 105
Art. 106 105
Art. 113 105
Art. 118 ..... 9, 104, 105
Art. 133 105

(5) Territorial Laws:
Ballou, Civil Laws of Hawaii (1897) §§ 1135-1137 91
Civil Code of Hawaii (1859) c. XIV 91
Compiled Laws of Hawaii (1884) c. XIV 91
Laws of Hawaii, 1892, c. 57, §§ 29-30 91
Puerto Rico, Constitution of the Commonwealth, Art. II, § 11 95

TREATIES AND EXECUTIVE AGREEMENTS
(indexed by name of other country and date)

Belgian Congo, 1943, 58 Stat. 1215 75
China, 1844, 8 Stat. 592 18
China, 1943 (abolition of general extraterritoriality), 57 Stat. 767 ..... 66, 75
China, 1943 (recognition of military extraterritoriality), 57 Stat. 1248 75
Cuba, 1903, 1 Malloy 358, 360 63
Egypt, 1937 (multilateral), 53 Stat. 1645 63
Egypt, 1943 (military extraterritoriality), 57 Stat. 1645 75
Ethiopia, 1951, 4 U.S. Treaties 2134 66
Great Britain, 1941 (Base Lease Agreement), 55 Stat. 1560 ..... 76, 156
India, 1943, 58 Stat. 1199 75
Japan, 1953 (Amendment of Art. XVII, Administrative Agreement), 4 U.S. Treaties 1846 ..... 77, 151
Morocco, 1786-1787, 8 Stat. 100; 2 Miller 185 70
NATO Status of Forces Agreement, 1953, 4 U.S. Treaties 1792 ..... 6, 63, 77-79, 157
Art. I 150
Art. VII(3) 13, 150, 152, 154

LEGISLATIVE MATERIALS:
Agreement Regarding Status of Forces of Parties of North Atlantic Treaty, Supp. Hearing, Sen. Comm. For. Affs., June 1953 78

Page

Agreements Relating to the Status of the NATO, etc., Hearings, Sen. Comm. For. Affs., April 1953 7
11 Cong. Rec. 409-417 ..... 67, 69
56 Cong. Rec. 5120, 5401-5402, 5471-5472 53
96 Cong. Rec. 1435 89
103 Cong. Rec. 617 (daily ed.) 145
Dept. of Army Appropriations for 1956, Hearings, House Comm. Approp., 84th Cong., 1st sess. 144
Dept. of Army Appropriations for 1957, id., 84th Cong., 2d sess. 144
Establishment of Military Justice, Hearings on S. 64, 66th Cong., 1st sess. 111, 112, 113

House Bills:
H.R. 2498, 81st Cong., 1st sess. 21
H.R. 4080, 81st Cong., 1st sess. 21, 22
H.R. 6583, 84th Cong., 1st sess 114

House Reports:
No. 491, 81st Cong., 1st sess., pp. 9-10 24
No. 1545, 83rd Cong., 2d sess. 143

Judicial, Extraterritorial Rights, Sen. Misc. Doc. 89, 47th Cong., 1st sess. 96

Senate Bills:
S. 4364, 65th Cong., 2d sess. 53, 124
S. 857, 81st Cong., 1st sess. 21
S. 2133, 84th Cong., 1st sess. 114

Senate Documents:
S. Ex. Doc. 21, 47th Cong., 1st sess. 67, 69
S. Misc. Doc. 89, 47th Cong., 1st sess. 67

Senate Report 2274, 84th Cong., 2d sess. 66-67
Status of Forces Agreements, Hearings on H.J. Res. 309, etc., 84th Cong., 1st sess. 153

Trials by Courts-Martial, Hearings on S. 5320, 65th Cong., 2d sess. 111, 113

Uniform Code of Military Justice:
House Hearings, pp. 565-1307 21
House Hearings, p. 811 23
Senate Hearings, p. 266 23

Page

MILITARY MATERIALS:

Board of Review Decisions
(indexed by name of accused)
Brillhart, CM 376967, review denied, 6 USCMA 808 26
2d Lt. E. R. Murray, 62 BR 35; 5 Bull JAG 258 162, 163
Rubenstein, 19 CMR 709, affirmed, USCMA, Jan. 25, 1957 146

CMO 11 of 1937 (U.S. Navy), p. 18 63
Dig. Op. JAG, 1868, pp. 225-232 122

Dig. Op. JAG, 1912:
p. 170, ¶ CHF 110
p. 481, ¶ IC 95
pp. 568-569, ¶ XIV H2 110

GCMOs, D/A, 1952-1956 (various items) 85
GCMO 1299, Hq. Southern Dept., 1917 112

General Orders:
No. 120, WD, 1900 49
No. 139, WD, 1917 48
No. 169, WD, 1917 113
No. 80, WD, 1918 48
No. 88, WD, 1919 112

Manuals for Courts-Martial:
Air Force, 1949, ¶ 11, p. 11 77
Army, 1949, ¶ 11, p. 11 77

U.S., 1951:
Chapter XXIV 106
Chapter XXV 109
Par. 12 77
Pars. 33, 35 127
Par. 36*b* 82
Pars. 84-91 85

Psychiatry in Military Law, AFM 160-42; TM 8-240 106
Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense 21

BRITISH STATUTES, ETC.:

The Air Force Act, 1955 (3 & 4 Eliz. II, c. 19) 33
Air Force Act, 1955 (Commencement) Order, S.I. 1955, No. 1806 35
Allied Forces Act, 1940 (3 & 4 Geo. VI, c. 51) 74
Army Act, §§ 175(7), 176(10), 189(1) 34
Army Act, 1881 (44 & 45 Vict., c. 58) 34
The Army Act, 1955 (3 & 4 Eliz. II, c. 18) 35

Page

Army Act, 1955 (Commencement) Order, S.I. 1955, No. 1805 ... 35
Army Discipline and Regulation Act (42 & 43 Vict., c. 33) ... 33

Articles of War:
Sec. XIV, Art. XXIII, of 1765 ... 33
Sec. 14, Art. 23, of 1774 ... 33

Manual of Military Law, 1951, pp. 392, 395, 414 ... 34
Mutiny Act ... 33
544 Parl. Deb. (H.C.), 5th Series, Written Answers, 205-206 ... 26
546 *id.* 201-202 ... 26
Petition of Right, 1628 ... 11, 120
United States of America (Visiting Forces) Act, 1942 (5 & 6 Geo. VI, c. 31) ... 22, 73
Visiting Forces (British Commonwealth) Act, 1933 (23 Geo. V, c. 6) ... 74

TREATISES AND ARTICLES:

3 *Works of John Adams*, 68-69, 83-84 ... 32
The Army Almanac, 211, 867-869 ... 48
Army Information Digest, April 1955, p. 47 ... 144
Baxter, *Scientists Against Time*, 438-447 ... 48
Beale ed., *The Diary of Edward Bates*, 481, 483, 498-503 ... 123
Bishop, *Case Concerning Rights of Nationals of the U.S.A. in Morocco*, 47 Am. J. Int. L. 136 ... 66
Brinton, *The Egyptian Mixed Courts and Foreign Armed Forces*, 40 Am. J. Int. L. 737 ... 73, 76
Brinton, *Jurisdiction over Members of Allied Forces in Egypt*, 38 Am. J. Int. L. 375 ... 76
Brinton, *The Mixed Courts of Egypt* ... 65, 69
Bruce, *Double Jeopardy and the Power of Review in Court-Martial Proceedings*, 3 Minn. L. Rev. 484 ... 112
1 *Building the Navy's Bases in World War II*, 133 ... 145
Cardozo, *The Nature of the Judicial Process*, 92-93 ... 133
2 Churchill, *A History of the English Speaking Peoples*, 309-331 ... 121
Davis, *A Treatise on the Military Laws of the United States*, 340-341 ... 32, 33
Diplomatic Correspondence, 1864, pp. 400-419 ... 69

Elliot's *Debates*:
Vol. 1, pp. 328, 335, 336 ... 37
Vol. 2, p. 468 ... 45
Vol. 2, p. 552 ... 37
Vol. 3, p. 206 ... 45
Vol. 3, p. 660 ... 37
Vol. 4, pp. 244-245 ... 37
Fairman, *Mr. Justice Miller and the Supreme Court*, 83-84 ... 123

Page

Farrand, *Records of the Federal Convention*
Vol. 2, pp. 37-49 70
Vol. 2, pp. 137-144 36
Vol. 2, pp. 168-182 43
Vol. 2, pp. 323-330 ..... 36, 37
Vol. 2, pp. 344-345 43
Vol. 2, p. 563 ..... 43, 44
Vol. 2, pp. 633, 637, 640 ..... 37, 43, 44
Vol. 3, p. 207 37

The Federalist 11, 37, 47, 124
No. 23 ..... 4, 38
No. 33 44
6 Freeman, *George Washington*, 93 130
Goodhart, *The Legal Aspect of the American Forces in Great Britain*, 28 A.B.A. J. 762 74

2 Hackworth, *Digest of International Law*
p. 493 71
pp. 512-517 ..... 65, 69
pp. 527-534 ..... 65, 66
Holmes, "The Path of the Law," in *Collected Legal Papers*, 167 79
Hudson, *The Thirty-First Year of the World Court*, 47 Am. J. Int. Law 66
Hughes, *Proc. Am. Soc. Int. Law, 1929*, p. 194 28
International Court of Justice, *Reports of Judgments, 1952*, p. 176 66

Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A.J. 961 132

The Journal of William Maclay, 221, 235 37

King, *Further Developments Concerning Jurisdiction over Friendly Foreign Armed Forces*, 46 Am. J. Int. L. 257 74-76
King, *Jurisdiction over Friendly Foreign Armed Forces*, 36 Am. J. Int. L. 539 73-76

Lee, *The Judge Advocate's Vade Mecum*, § 22 157
Maitland, *The Constitutional History of England*
pp. 324-326 ..... 120, 121
p. 448 34
Moore, *The Case of Mrs. Surratt*, 58 167

2 Moore, *Digest of International Law*
pp. 593, 596 ..... 64, 65
p. 613 65
pp. 637-661 65
pp. 722-727 ..... 65, 69
1 Moore, *Extradition*, 100-105 65

Page

Morgan, *Court Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 Minn. L. Rev. 79 56
Morgan, *The Existing Court Martial System and the Ansell Army Articles*, 29 Yale L. J. 52 112
Pitman, *The Assassination of President Lincoln and the Trial of the Conspirators*, 250 107
Rankin, *When Civil Law Fails*, 138-139 53
Ravndal, *The Origin of the Capitulations and of the Consular Institution* 64
Re, *The NATO Status of Forces Agreement and International Law*, 50 N.W.L. Rev. 349 79
Reminiscences of General Haupt 48
A Report on the Case of Tyler Kent, 11 Dept. of State Bull. 243 153
Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 Col. L. Rev. 1091 78
Schwelb, *The Status of Soviet Forces in British Law*, 39 Am. J. Int. L. 330 74
Shine, *Fallacious Attacks Against the Code*, 20 The Judge Advocate J. 1 114
Snee and Pye, *A Report on the Actual Operation of Article VII of the Status of Forces Agreement*, 43 151
Spaulding, *The United States Army in War and Peace* 122
Stacey, *Six Years of War*, 426 note 74
Sweeney, *Treaty Rights of the United States in Morocco*, 27 Dept. of State Bull. 620 66
Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians*, 12 Calif. L. Rev. 75 57
U. S. Civil Service Comm., *Federal Employment Statistics Bulletin*, Oct. 1956, p. 9 145
The United States Court for China, 49 Harv. L. Rev. 793 108
Upton, *The Military Policy of the United States* 122
Warren, *The Making of the Constitution*, 482-484 37
2 Warren, *The Supreme Court in United States History*, 496-497 123

Winthrop, *Military Law and Precedents* (2d ed. 1896):
pp. *13-*14 36
pp. *54-*55 82
pp. *131-*145 ..... 39, 40, 50, 55, 59, 158
p. *229 82
p. *241 114
p. *683 84
pp. *694-*702 110
pp. *1297-*1312 122
pp. *1331-*1335 123
pp. *1461, *1497 33

	Page
pp. *1504-1508	36
p. *1531	54

MISCELLANEOUS:

9 Dept. of State Bull. 114	75
35 Dept. of State Bull. 844	67
Ex. Order 10565, Sept. 28, 1954, 19 Fed. Reg. 6205	109
Ex. Order 10652, Jan. 10, 1956, 21 Fed. Reg. 235	109
27 J. Cont. Cong. 518	44
32 J. Cont. Cong. 355	70
J. Sup. Ct., Oct. T. 1955, p. 237	18
6 Op. Atty Gen. 200	110
7 Op. Atty Gen. 338	110
7 Op. Atty Gen. 453	107
11 Op. Atty Gen. 215	123
11 Op. Atty Gen. 297	123
18 Op. Atty Gen. 113	111
14 Proc. Mass. Hist. Soc., 2d Series, 325	51
Proclamation No. 2626, 9 Fed. Reg. 12403	76
Washington Post, Dec. 12, 1917, p. 4	113
Washington Post, Jan. 19, 1957, p. 1	155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 701, Oct. T. 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

On Appeal From the United States District Court for the District of Columbia

No. 713, Oct. T. 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*,

v.

WALTER KRUEGER

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF ON REHEARING ON BEHALF OF APPELLEE AND RESPONDENT

INTRODUCTORY STATEMENT

This supplemental brief is submitted in response to the Court's order for reargument (352 U.S. 901). Considera tions of space, no less than of expense, make it undesirable

to repeat what was fully and indeed exhaustively presented at the last Term. There will, accordingly, be liberal cross-references to the earlier briefs.[1]

The argument that follows will cover not only the questions put by the Court in its order for reargument but also the points that were briefly outlined in the Petition for Rehearing.

SUMMARY OF ARGUMENT

I. A. The territorial sovereign does not confer jurisdiction on the personal sovereign, but simply consents to the personal sovereign's exercise of its own jurisdiction; and the scope of the latter depends, not on the territorial sovereign's consent, but on the personal sovereign's law. Thus, if a ship of Country A is in the territorial waters of Country B, and a homicide is committed on board by a member of the crew, primary jurisdiction belongs to the territorial sovereign, so that the territorial sovereign's claim to trying the offender prevails. *Wildenhus's Case*, 120 U.S. 1. But if the territorial sovereign is content to let the personal sovereign proceed with the trial, the latter can do so, thus establishing that the territorial sovereign's jurisdiction is not exclusive but only primary. *United States* v. *Flores*, 289 U.S. 137. If, however, the personal sovereign's law is insufficient to reach the offense, then the territorial sovereign's consent is ineffective to prevent the offender's going free; that course necessarily follows

[1] They will be hereinafter cited as follows:

Brief for Appellant in No. 701: U.S. Reid Br.
Brief for Appellee in No. 701: Covert Br.
Brief for Petitioner in No. 713: U.S. Kinsella Br.
Brief for Respondent in No. 713: Krueger Br.
Reply Brief for Appellant in No. 701 and Petitioner in No. 713: U.S. Reply Br.
Petition for Rehearing in both cases: Pet. Reh.
Memorandum in Reply to Petition for Rehearing: U.S. Memo.
Supplemental Brief for Appellant and Petitioner on Rehearing: U.S. Supp. Br.

if the courts of the personal sovereign lack jurisdiction of the offense (*United States* v. *Wilthberger*, 5 Wheat. 76) or if the particular court of the personal sovereign lacks jurisdiction of the person (*Toth* v. *Quarles*, 350 U.S. 11). Thus the assumption underlying last June's opinions, that there was a relinquishment of jurisdiction by England and Japan which automatically empowered the United States to try these civilian women by court martial, is shown to be wholly untenable.

B. Moreover, as the legislative history of Art. 2(11), UCMJ, clearly shows, the American military jurisdiction asserted in these cases did not purport to be conditional. The "subject to" clause was intended only as a limitation, to preclude international complications that might otherwise arise. Both the history of the provision and the consistent practice thereunder establish that the jurisdiction asserted was not conditional on the territorial sovereign's consent, but was simply to be limited in the event that the latter objected.

C. Furthermore, if, as a matter of American law, including of course American constitutional law, American courts-martial lack power to try particular civilians, then such courts-martial cannot be granted a wider jurisdiction by treaty or international agreement. This follows from the rule, frequently repeated and never questioned, that no treaty can prevail over specific constitutional guarantees and prohibitions, in this instance the twice guarantged right of trial by jury. The United States cannot conduct its foreign relations in a manner that will violate constitutional guarantees. To the extent that the Court last June rested its conclusions on the international arrangements made with England and Japan, it contradicted its own denial that no question of the legal relationship between treaties and the Constitution was presented.

II. Nothing in the Constitution of the United States authorizes the trial of civilians by court-martial in time

of peace and not in occupied territory; and under this heading it is fundamental that all power exerted by the United States must find a basis in the Constitution.

A. The Clause 14 power "To make Rules for the Government and Regulation of the land and naval Forces" does not reach these cases, howsoever viewed.

1. The English precedents prior to 1789 and our own practice for well over a century thereafter established that the only civilians triable by court-martial are those few who were functionally connected with the forces and who served with them in an area of military operations during periods of actual hostilities. Hamilton's comments in No. 23 of *The Federalist*, fairly and accurately read, do not in any sense support the view that the persons included within "land and naval Forces" were deemed to be a class which could be expanded as the legislative judgment from time to time might determine. Neither the supporters nor the opponents of the new Constitution ever envisaged or imagined such a possibility.

The long course of consistent practice of the military authorities, who adhered strictly to the limits of military jurisdiction known in 1789, fixes in definitive fashion the boundary between military and jury trials as it then existed. This follows from the cases on the effect of contemporaneous constitutional construction, and from the decisions fixing the boundaries of jury trial. It is significant that every attempt to enlarge the scope of military jurisdiction as it was recognized in 1789 has failed. *Ex parte Milligan*, 4 Wall. 2; *Duncan* v. *Kahanamoku*, 327 U.S. 304; *Toth* v. *Quarles*, 350 U.S. 11.

2. Moreover, nothing in the Necessary and Proper Clause, either as a matter of construction or of application over the years, enlarges the scope of "land and naval Forces" in Clause 14. No one thought so for a minute when the Constitution was adopted, and no military men thought so either for a century after *M'Culloch* v. *Maryland*,

4 Wheat. 316, had demonstrated the potentialities of Clause 18. The reason for both attitudes is plain. Any such enlargement would correspondingly contract the class of civilians who could claim a jury trial. The operation of the Necessary and Proper Clause has never been permitted to erode a single personal liberty guaranteed by the Bill of Rights.

To deprive of the right to jury trial a class of civilians who had that right in 1789 is not a legitimate end, is not within the scope of the Constitution, is twice prohibited by the Constitution, and is wholly inconsistent with the spirit of the Constitution. Cf. *M'Culloch* v. *Maryland*, 4 Wheat. at 421. And that was the holding of *Toth* v. *Quarles*, 350 U.S. 11, 21-23.

3. Significantly enough, the power purportedly conferred by Art. 2(11), UCMJ, under which the present prosecutions were instituted, has never been sought to be constitutionally justified in any legislative discussion. Insofar as it was considered at all by text-writers, it was rested on the language of the Fifth Amendment. That notion was demolished by *Toth*, nor is it now sought to be revived. And the opinions last June did not seek to rest Art. 2(11) on Clause 14, with or without Clause 18.

4. Since civilian dependents admittedly cannot be tried by court-martial in the United States although members of the armed forces can be, the present assertions must rest on the proposition that a dependent accompanying the forces overseas loses his or her civilian status.

That proposition is plainly untenable. It is inherently absurd, because the point of supposed transformation cannot be fixed. It is legally unsound, because the Constitution cannot be divided into clauses that stop at the water's edge and those that are available for export. It is factually unfounded, because such additional overseas amenities as the Government relies on are primarily conferred by foreign countries. And the attempt to semanticize over-

seas civilian dependents into a military status, on the basis of rhetorical conclusions that they are indistinguishable from the forces, breaks down utterly in the face of the provisions of the NATO Status of Forces Agreement under which primary jurisdiction over all offenses committed by civilian dependents is conceded to the receiving states. Thus the United States has solemnly recognized a distinction which according to arguments now presented does not exist.

B. The now abolished consular jurisdiction, considered in *In re Ross*, 140 U.S. 453, on which so much reliance was placed last June, does not support the present trials by court-martial.

1. American consular jurisdiction in non-Christian countries was based essentially on force. It was gradually abandoned, and in 1956 it was finally abolished as unsuited to modern conditions. Yet, ironically enough, this Court relied upon that "well-found historical jurisdiction" in the same year to justify trials by court-martial that it was not prepared to rest on the power to govern the armed forces.

The consular jurisdiction cannot be sustained on the basis stated in *Ross*, 140 U.S. at 464, that "The Constitution can have no operation in another country", for the reason that, very plainly, "The Constitution of the United States is in force * * * wherever and whenever the sovereign powers of that government is exerted." *Balzac* v. *Porto Rico*, 258 U.S. 298, 312. Nor can it be sustained on the ground that the consul was sitting as a judge of the foreign country; he was not, as he purported to act only as an American officer, punishing for a violation of American law. The only basis for sustaining the non-jury aspect of the consular jurisdiction is that it dated from 1786-1787, that it was thus pre-constitutional, and that it was accordingly impliedly excepted from the Sixth Amendment. But that is also the reason why these women cannot be tried by court-martial; they had a right to jury trial in 1789 and before.

2. Unlike consular jurisdiction, which rested on express treaty provisions, extraterritorial jurisdiction over military personnel flows from accepted doctrines of international law. It was so held in *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 139-140; many other countries agreed; and prior to 1953 the United States always so contended and obtained immunity for its overseas troops accordingly. While the doctrine of military extraterritoriality was not always consistently recognized by great powers in dealing with weaker ones, it is plain that such military extraterritoriality as is conceded does not involve in any aspect a cession of jurisdiction by the territorial sovereign to the personal sovereign. Both prosecutions here were brought by the United States. Therefore, even if the consular jurisdiction is still valid—a point that was not conceded last spring—it could not justify the present trials by court-martial.

C. The courts-martial here involved cannot be sustained as legislative courts.

1. While the decisions in this Court have not always been consistent as to which courts are legislative rather than constitutional, it is plain that, prior to 1956, no one ever thought of a court-martial as a legislative court.

2. A court-martial is an executive court, for two functional reasons: First, it is created by the order of an executive officer; and second, its judgments remain a nullity until they are acted on by such an officer. Both propositions are still true under the Uniform Code. This Court has always had appellate jurisdiction over legislative courts, but it cannot review directly the judgments of military tribunals, because those are executive courts, all of whose proceedings must be reviewed by an executive officer. Courts-martial are not and by their nature cannot be legislative courts.

3. But to assume the contrary for purposes of argument is still unhelpful. Legislative courts are created by Con-

gress in the exercise of some power other than that granted by Article III. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. On that footing and on that assumption, a court martial would be a legislative court created under the Clause 14 power—which simply brings us back to the inquiry, avoided by the Court last June, whether that power extends to these cases.

4. The circumstance that a particular tribunal is a legislative rather than a constitutional court does not automatically dispense with the requirement of a jury in criminal cases. Thus, the courts in Alaska are plainly legislative in nature—but a criminal defendant there is entitled to a jury trial (*Rassmussen* v. *United States*, 197 U.S. 516). The cases relied on last June (*Hawaii* v. *Mankichi*, 190 U.S. 197; *Dorr* v. *United States*, 195 U.S. 138; *Balzac* v. *Porto Rico*, 258 U.S. 298) did not involve legislative courts created by Congress at all. Those defendants were tried in the local courts of Hawaii, the Philippines, and Porto Rico, respectively, in tribunals all of which were already in existence when those islands passed under American sovereignty. And the true basis for sustaining the non-jury trials in all three cases was, as the opinions plainly show, that the common law jury had not formed a part of the new possession's ancient institutions. Those considerations are insufficient to reach a class of American civilians who, in 1789, were triable only by jury.

5. The guarantee of bail has been deemed so fundamental that it was included in the organic laws for the Philippines and Puerto Rico in which provisions for jury trial were not included. Other fundamental guarantees, such as the protection against double jeopardy and against cruel and unusual punishments, have been enforced in those areas. And even the consular courts made provision for bail. But there is no such thing as bail in military law, even under the Code. The authorities relied on last June do not justify this deprivation, which strikingly em-

phasizes the utter inappropriateness of trying civilians by court-martial.

D. No other power or combination of powers conferred by the Constitution supports the asserted jurisdiction.

1, 2. The war power is irrelevant here, for reasons already set forth, and would be unavailing in any event; it does not justify an extension of military jurisdiction over civilians beyond the limits traditional at the time of the adoption of the Constitution. *Ex parte Milligan*, *Duncan* v. *Kahanamoku*, both *supra*. Considerations based on Art. IV, Sec. 3, are similarly irrelevant, since the territory of the United States is not involved.

3. An exertion of Congressional power is frequently said to rest on several powers. But here the Clause 14 power and the treaty power are both individually inadequate; how then can they become sufficient in the aggregate? Even in constitutional law, the whole cannot be greater than the sum of its parts.

E. The court-martial jurisdiction exercised in the present cases cannot be sustained apart from the power to govern the armed forces. The Court last June avoided inquiry into the scope of that power. But unless the scope of Clause 14 is examined, it is plain that no other power supplies a constitutional basis for these prosecutions.

1. Absent the Clause 14 power, no law made criminal the act for which these women were tried. Ross violated R.S. § 5339 which denounced murder on board an American vessel. All other prosecutions before consuls required a showing that some Act of Congress was being violated. But the only law covering what these women did was Art. 118, UCMJ, which applied only to "Any person subject to this code." Other punitive articles of the Uniform Code are broad enough to reach all persons, whether subject to the Code or not. Consequently in order to render punishable what these women did, it is necessary to show that

they were, as a matter of law, subject to the Uniform Code. No such showing can be made without considering the scope of Clause 14.

2. Moreover, only Clause 14 supports the broad delegation of power to the President to regulate the procedure of courts martial, to prescribe rules of evidence, to define offenses, and to determine elements of criminality. Art. 36(a), UCMJ. This delegation is not troublesome in the case of accused persons in uniform, since the President is their constitutional Commander in Chief. But he is given command power only over the armed forces. Therefore, unless it is first decided that these women can be included within "land and naval Forces" in Clause 14, the legislative powers that the President has in fact exercised in the *Manual for Courts-Martial*, provisions that are shown to have been determinative in the present cases, cannot be sustained. The Constitution does not empower the President so to legislate for the conduct of persons over whom he has no military command.

3. If Congress can subject these women to trial by court-martial in time of peace, it is not bound to extend to them the present statutory safeguards. As recently as the First World War, under the 1916 Articles of War which first purported to subject civilians to trial by court-martial in time of peace, it was perfectly legal to execute some death sentences without appellate review and to require courts martial to reconsider acquittals and light sentences. Even today, there is neither bail nor any right to confrontation at military law; Fourth and Fifth Amendment protections are markedly narrower; and it is not yet clear that military deviations from the constitutional norms established by the civil courts are subject to judicial review. Yet the opinions last June leave unanswered the source of the Congressional power to withdraw so many freedoms from the civilian dependents of servicemen.

4, 5. The military considerations set forth in the opinions last June and now again advanced by the Government

are relevant only to the Clause 14 power the extent of which the Court was unwilling to examine, even though, as the present records show, these trials were not sought to be justified under any other power before the cases were on appeal.

F. Military trial of civilians is utterly foreign to the American tradition; this conclusion is fully documented, beginning with the Petition of Right in 1628. The deviations during the Civil War were momentary, and fully corrected by *Ex parte Milligan*, 4 Wall. 2; nor did any civilian or military lawyer for the rest of the Nineteenth Century find in *The Federalist* or in the Necessary and Proper Clause what the Government first reads into both today. And *Duncan* v. *Kahanamoku*, 327 U.S. 304, reaffirmed the traditional boundaries on broad institutional grounds.

Examination of the present records shows that these women were dealt with far more harshly and unreasonably than they would have been in any American civilian court, and documents the conclusion reached in *Toth* that members of the armed forces are far better qualified for fighting than for judging.

Courts martial are incapable of receiving judicial power over civilians. The argument of necessity now adduced, even if it were factually sound, is essentially one of expediency, against which constitutional protections should be proof. And if "we turn to the words of the Constitution read in their historical setting as revealing the purposes of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes" (*United States* v. *Classic*, 313 U.S. 299, 317-318), then it is plain that the Constitution confers no power to court-martial civilians in time of peace, and that a contrary conclusion does violence to the ideals of the Founders and to the traditions of the Constitution which they wrote.

III. The result reached last June is completely irreconcilable with *Toth* v. *Quarles*, 350 U.S. 11.

A. When habeas corpus was sought on Toth's behalf, he was in Korea. The fact that he was taken there forcibly could not, under familiar principles, affect the jurisdiction of the tribunal which sought to try him. He was in Korea, and was being tried, with that country's consent. Therefore the reasoning of the opinions in the present cases was amply sufficient to justify his trial also, yet his was held to be beyond the constitutional power of Congress.

B. Even if, contrary to the facts, it were assumed that Toth had sought to prevent his being returned to Korea, he would have been contesting extradition to what the Court in these cases has held to be a legislative court. But Congress since 1793 has made provision for extradition to legislative courts, without serious constitutional objection. Here again, the reasoning and the holding of *Toth* cannot be reconciled with the reasoning and the holding in the present cases.

IV. As long as the object sought to be attained is the punishment of crime rather than military control of civilians, practical alternatives are available.

A. These are not cases where "practical necessities" can be determinative. The question is not one of substantive due process, even in an emergency, but concerns the scope of jury trial. The States are free to adopt innovations in criminal procedure, subject only to Due Process limitations; but federal procedures are limited by the Bill of Rights. Therefore, in ascertaining the limits and the incidents of jury trial under the federal Constitution, a showing of reasonableness is not enough; the matter has been placed beyond the reach of legislative judgment.

Moreover, the statements now presented to the Court do not measure up to the requisite standard of trust

worthiness; they are *ex parte, post motam litem*, and obviously self-serving.

B. If the present civilian employees must for military reasons be subjected to military command and military trial, then the obvious and constitutional course is to send only military personnel overseas.

The letters from overseas commanders, that are now presented do not disclose what is found in authoritative legislative materials, viz., that the sole reason why so many civilian employees rather than servicemen are now accompanying the armed forces abroad is purely budgetary.

The letters now presented do not disclose what is found in statistical compilations published by the Government, viz., that as against 23,000 American civilian employees abroad, the armed forces overseas employ directly or indirectly over 350,000 non-American civilians, over whom they have no disciplinary sanctions.

The letters now presented do not establish, what appears to be the fact, that the bulk of the American civilian employees abroad are not in any sense highly skilled technicians.

Thus, the argument of necessity reduces itself to one of simple expediency, which proposes to measure the values of the Bill of Rights by showing that elimination of its protections will effect monetary savings.

C. The civilian dependents cannot be militarized, but their offenses are shown to be so few, as not to present any real problem. Moreover, and this is a highly significant fact that the Government nowhere discloses, under present treaties the United States has already conceded to foreign countries primary jurisdiction over all crimes committed by civilian dependents. NATO Status of Forces Agreement, Art. VII (3). The problem of possible criminal acts by dependents is thus dealt with as are similar

acts by American diplomats, whose offenses are not now punishable by American or foreign law, viz., on a basis of waiver.

D. Ample practical means are available to punish crimes committed abroad by civilian dependents. Primary jurisdiction over such offenses has already been conceded to the foreign countries. To the extent that a waiver can be obtained, the obvious and plainly constitutional course is to provide for a trial in the first judicial district into which the offender is brought. In the air age, this does not present insuperable difficulties. And minor offenders can be dealt with by the deterrent effect of knowing that they will be sent home if they offend.

E. There is no constitutional difference between civilian dependents and civilian employees in time of peace; the precedents show that military jurisdiction is dependent on military status, not on functional connection with the forces.

F. There is similarly no constitutional difference between major crimes and petty offenses; courts martial do not have power to try or punish civilians committing either. The only distinction is the practical one of the appropriate remedy.

V. In any event, even on the assumption that Art. 2(11), UCMJ, is constitutional, Mrs. Covert cannot now be tried by court-martial in the District of Columbia, within the very shadow of the Capitol dome.

A. In deciding last June that "military jurisdiction, once validly attached, continues until final disposition of the case", the Court was more militarist than the military; for the military rule, since 1862, has always been that military jurisdiction ceases whenever military status is terminated by affirmative act of the Government, at any stage of the proceedings. While military jurisdiction is not lost when the soldier's term of enlistment expires or the officer's

commission is terminated by operation of law or the accused escapes, such jurisdiction is destroyed by any affirmative act by the Government that effects a change in status, such as discharge or separation. Here Mrs. Covert, on the assumption made, had a military status only while accompanying the forces overseas; when the United States returned her to this country, it terminated that military status, which had been geographically limited by the terms of Art. 2(11). Even if any intention can properly be attributed to an aggregation of many individuals, the decisions of this Court show that it is the fact of separation from military status, not the intent which may accompany such separation, which is determinative.

B. In any event, by the plain terms of Art. 2(7), UCMJ, further military jurisdictions over Mrs. Covert ceased when she was placed in civilian custody. For, since 1951, Congress has made military jurisdiction in confinement depend, not on the kind of court adjudging the sentence, but on the kind of institution where that sentence is served. The present question does not arise in the case of military personnel, whose status does not change during the appellate process—a further demonstration of the unsuitability of any application of the Uniform Code of Military Justice to civilians.

C. The rationale of last June's opinion in the *Kinsella* case, which sustained the military trials of accompanying civilians overseas on the basis of legislative courts, breaks down when sought to be applied to Mrs. Covert's retrial. For the guarantee of jury trial applies in full force in the District of Columbia, whose courts are moreover constitutional Article III courts. And *In re Ross*, 140 U.S. 453, did not hold that Ross could have been retried by a consul in this country.

ARGUMENT

I. THE CONSENT OF ENGLAND AND JAPAN TO THE EXERCISE OF AMERICAN MILITARY JURISDICTION WITHIN THEIR TERRITORIES IN RESPECT OF OFFENSES COMMITTED THEREIN DID NOT AND COULD NOT INVEST AMERICAN COURTS-MARTIAL WITH JURISDICTION TO TRY PARTICULAR PERSONS

In view of the present posture of these cases, it seems essential to analyze the concepts of jurisdiction that are involved, in order that attention may be focused on what must in the end be the determinative factor, viz., the powers conferred by the Constitution of the United States, and the limitations imposed by that instrument.

A. The Territorial Sovereign Does Not Confer Jurisdiction on the Personal Sovereign, But Simply Consents to the Personal Sovereign's Exercise of Jurisdiction; and the Scope of the Latter's Jurisdiction Depends, Not on the Territorial Sovereign's Consent, But on the Personal Sovereign's Law.

It will clarify consideration of who has jurisdiction—i.e., power—to try whom, if we suppose that a ship belonging to Country A is in the territorial waters of Country B, and that, while in those waters, a homicide is committed on board that ship by a member of its crew. Country B is, by hypothesis, the territorial sovereign; Country A we shall call the personal sovereign.

Case 1. Country B insists on trying the offender in its own courts. Since, clearly, the territorial sovereign has primary jurisdiction, B's claim prevails.

Case 2. Country B is content to let Country A try the offender by the laws of A. If the laws of A reach the offense, A can do so—which proves that the territorial sovereign's jurisdiction was only primary and not exclusive.

Case 3. Country B is similarly content to let Country A try the offender in the courts of A, and such a trial is had.

There, however, it appears that the accused cannot be punished, for one of two reasons: Either the laws of A do not reach the homicide, i.e., the courts of A have no jurisdiction of the offense; or else the particular court in which the offender is brought has no power to try that person, i.e., it lacks jurisdiction of the person. In either event, the defendant goes free. Case 3 thus demonstrates that the territorial sovereign's consent to trial by the personal sovereign does not automatically empower the personal sovereign to punish the offender.

Each of the foregoing situations can be illustrated by decisions of this Court.

Case 1. A Belgian ship is moored to a pier at Jersey City, N.J. While there, one member of the crew kills another member. The State of New Jersey insists on trying the offender. Its jurisdiction prevails over that asserted by the Belgian Consul on behalf of the Belgian Government. *Wildenhus's Case*, 120 U.S. 1.

Case 2. This is the converse of Case 1. An American ship is 250 miles up the Congo River, in Belgian territory, viz., the Belgian Congo. One member of the crew kills another. The Belgian authorities permit the offender to be removed to the United States, where he is placed on trial in a U. S. District Court. *Held*, that the killing is within Criminal Code § 272 (now 18 U.S.C. § 7), that this statute represents an exercise of admiralty and maritime jurisdiction under Art. III, § 2, of the Constitution, and that the offender must accordingly stand trial. *United States* v. *Flores*, 289 U.S. 137. Thus the *Flores* case proves that the territorial sovereign's jurisdiction was only primary and not exclusive. The Government's assumption that territorial jurisdiction is exclusive (U. S. Memo. 3; U. S. Supp. Br. 3, 40) is therefore patently erroneous.

The Court specifically noted (289 U.S. at 159) that the doctrine of *Wildenhus's Case* "does not impinge on that

laid down in *United States* v. *Rodgers*, [150 U.S. 249], that the United States may define and punish offenses committed by its own citizens on its own vessels while within foreign waters where the local sovereign has not asserted its jurisdiction."

The *Rodgers* case involved an American ship in the Great Lakes, within Canadian territorial waters, on board of which an aggravated assault had been committed. This Court held that the case was within R. S. § 5346 (later Criminal Code § 276 and now 18 U.S.C. § 443), and that the defendant was triable in a United States Court. *Rodgers* is distinguishable from *Flores* in this, that the offense was probably not sufficiently serious, in the light of the discussion in *Wildenhus*, to confer an acknowledged primary jurisdiction on the territorial sovereign.

Case 3. (a) In February 1819,[2] long before Americans were granted extraterritorial rights in China by the Treaty of 1844 (8 Stat. 592), an American ship is at anchor in Chinese territorial waters. One crew member kills another. The Chinese do not assert their territorial jurisdiction, and the offender is returned to the United States for trial in a federal court. Counsel for the United States argues (5 Wheat. at 82-84): "But China herself disclaims jurisdiction in such cases, and *remands* them to the forum of the offending party. The offence here, being committed by a citizen of the United States upon another citizen on board a merchant vessel of this country, lying in the waters of a foreign country, which expressly disclaims jurisdiction of the case, it is dispunishable, unless it be punishable in the Courts of this country; * * *." *Held*, however, that since no Act of Congress then in force

[2] The date of the offense is taken from the indictment, which is among the records now lodged in the Archives pursuant to the Court's order of May 7, 1956. J. Sup. Ct., Oct. T. 1955, p. 237. The trial took place in October 1819. See *United States* v. *Wiltberger*, 3 Wash. C. C. 515, Fed. Case No. 16738 (C. C. E. D. Pa.).

reaches the offense, the defendant goes free. *United States v. Wiltberger*, 5 Wheat. 76.[3]

(b) An American soldier in Korea kills a Korean. In view of the rule of international law long espoused by the United States, viz., that an armed force in a friendly country with the consent of that country enjoys extraterritoriality as a matter of international law (see pp. 71, 80, *infra*), Korea does not assert jurisdiction. By the time the killing is uncovered, the soldier is a civilian, but an Act of Congress purports to give courts martial jurisdiction to try him none the less. The statute being held unconstitutional, the ex soldier goes free, notwithstanding Korean consent to his trial. *Toth v. Quarles*, 350 U.S. 11.

Both *Wiltberger* and *Toth* thus establish that the territorial sovereign's consent to trial by the personal sovereign does not automatically empower the personal sovereign to punish the offender.

The basic misconception underlying last June's opinion is the view that there was a cession of jurisdiction by Japan (350 U.S. at 473-474, 479) which automatically conferred jurisdiction on a particular American tribunal to try the offense. Such a holding is contrary both to *Wiltberger*, which plainly held that the territorial sovereign's consent did not automatically confer on the personal sovereign jurisdiction of the offense, and to *Toth*, which similarly and necessarily held that the territorial sovereign's consent did not automatically confer on a particular tribunal of the personal sovereign jurisdiction of the person of the accused.

When, as in all the cases discussed, these two included, there is either a concurrent or a *prima facie* concurrent

[3] It was to reach such offenses that Congress passed the Act of March 3, 1825, c. 65, 4 Stat. 115, the provisions of which as carried forward into the Revised Statutes and into the Criminal Code were considered in *Rodgers* and *Flores*, *supra*.

jurisdiction, "There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both." *United States* v. *Flores*, 289 U.S. at 158. As will be pointed out below, pp. 71-80, this lack of entire agreement has extended to the question of jurisdiction over foreign friendly armed forces. But where, as in the two cases at bar, there is complete agreement between the territorial sovereign and the personal sovereign on that score, the scope of the personal sovereign's jurisdiction over the offense and of the competence of a particular court of the personal sovereign over the offender, both depend, as *Wiltberger* and *Toth* demonstrate, not on the consent of the territorial sovereign, but on the municipal law of the personal sovereign. The Government's argument (U.S. Supp. Br. 4, 81-82), which makes the scope of American jurisdiction turn on the extent of the jurisdiction that foreign nations are prepared to confer by treaty, is in consequence completely untenable.

We go on to show, first, that the jurisdiction now asserted was always based on American law, and next that it could not constitutionally be rested on any other foundation.

B. The American Military Jurisdiction Asserted in the Present Cases Did Not Purport to be Conditional on Foreign Consent, But Was Rested on an Assumed American Power.

Another misconception underlying last June's decision is placed in sharp relief by the first sentence of the Court's opinion (351 U.S. at 471):

> "Congress, in Article 2(11) of the Uniform Code of Military Justice, has provided that all persons 'accompanying the armed forces without the continental limits of the United States' and certain named territories shall be subject to the Code *if* such jurisdiction is authorized under 'any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law.'"

The italics have been added to underscore the circumstance that the jurisdiction in question was assumed by the Court to have been conditionally conferred.

But the history and textual development of that provision establish the precise contrary.

First. AW 2(d) of 1916 (Covert, Br. 124) was a flat, unequivocal, and unconditional assertion of military jurisdiction over civilians accompanying the armies overseas.

Second. In the first draft of the Uniform Code, "based on the Report of the Committee on a Uniform Code of Military Justice to The Secretary of Defense", proposed Art. 2(11) was in this form (p. 4):

> "(11) All persons serving with, employed by, accompanying, or under the supervision of the armed forces without the continental limits of the United States and the following territories: * * *"

The commentary (p. 6) read:

> "Paragraphs (11) and (12) are adapted from 34 U.S.C. § 1201, but are applicable in time of peace as well as war. Paragraph (11) is somewhat broader in scope than AW 2(d) in that the Code is made applicable to persons employed by of under the supervision of the armed forces as well as those serving with or accompanying the same and the territorial limitations during peace time have been reduced to include territories where a civil court system is not readily available."

The text as drafted by the Secretary of Defense's Committee was carried into the first bills providing for the UCMJ, H.R. 2498 and S. 857, both 81st Cong., 1st sess., which were simultaneously introduced on February 8, 1949.

The House Commiftee held hearings on H.R. 2498 from March 7 to April 4, 1949 (House Hearings, pp. 565-1307), on April 7 introduced a revised bill, H.R. 4080, in which

the "under the supervision of" clause of Act 2(11) was defeted. In H.R. 4080, Art. 2(11) read in pertinent part as follows:

> "(11) All persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and the following Territories: * * *"

When H.R. 4080 was reported out, on April 28, 1949, Art. 2(11) had been amended to read:

> "(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the Armed Forces without the continental limits of the United States and the following Territories: * * *"

In the Senate, H.R. 4080 was reported in redrafted form on June 10, 1949, but the only change made by the Senate Committee in Art. 2(11) was the omission of capital letters, and that provision was enacted into law without further alterations.

The "subject to" clause, therefore, is on its face a limitation rather than a condition, and the hearings show that what the Committee desired was to avoid any assertion of American jurisdiction over foreign nationals who would otherwise literally fall within Art. 2(11) and particularly within Art. 2(12).

The problem was not a new one. The British Act of 1942—United States of America (Visiting Forces) Act, 1942 (5 & 6 Geo. VI, c. 31)—had by the proviso to its Sec. 2(1) expressly excepted from the scope of American jurisdiction non-Americans employed by the U.S. forces who were first so employed in the United Kingdom (U.S. Reid Br. 76). And in the hearings on the Uniform Code it was pointed out that the broad language of draft Art. 2(12) —"All persons within an area leased by the United

States" would extend American military jurisdiction too broadly and hence occasion international complications.

Thus, Mr. L'Heureux said (House Hearings, p. 811), "In contrast to [34 U.S.C. § 1201], article 2, section 12, has no limitation whatever and would make natives or visitors subject to military law. That could possibly create serious international complications. I am sure that the full exercise of this authority would violate a large number or all existing executive agreements in connection with leased bases. That is contrary to international law . . . [T]his bill provides in leased bases, where we usually have agreement with the people, and they are presumably friendly people—you should not regard that lease agreements, independent agreements, make these civilians subject to military law for military offenses."

Major General T. H. Green, then The Judge Advocate General of the Army, urged a similar limitation on the Senate Committee, his proposal being to limit Art. 2(12) to time of war or national emergency. He said, in a carefully drafted memorandum (Senate Hearings, p. 266):

> "It is to be noted that article 2(12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any person residing in or visiting a base area at any time. The enactment of a statute conferring such sweeping jurisdiction over foreign nationals whose only connection with the armed forces might be that they are native or residents of an area leased to the United States, will inevitably lead to international complications."[4]

The House Committee's explanation of its amendments adding the "subject to" clause reflect the rationale of the foregoing objections. Here is the full excerpt from the

[4] It is interesting to note that General Green objected on constitutional grounds to Art. 3(a), UCMJ, which was invalidated in the *Toth* case. See 350 U.S. at 20-21.

Committee report (H.R. Rep. 491, 81st Cong., 1st sess., pp. 9-10):

"In addition to the committee amendments to H.R. 2498 which appear as original provisions in H.R. 4080, two substantive amendments to H.R. 4080 which are worthy of comment have been adopted by the committee. * * * The second amendment pertains to article 2, page 5, subdivision 11, beginning on line 18, and subdivision 12, beginning on line 24. You will note that subdivision 11 confers jurisdiction over all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and certain territories. Subdivision 12 confers jurisdiction over all persons within an area leased by the United States which is under the control of the Secretary of the Department and which is without the United States and certain Territories. It has been discovered that the United States armed forces occupy certain territory in the Philippines, which territory was originally acquired for the use of the United States by virtue of the 1898 Treaty with Spain, which territory continues to be used by our armed forces by virtue of the military base agreement of 1947 between the United States and the Philippines. We find that under the provisions of subdivision 12, we will have no jurisdiction over persons not otherwise subject to this code who enter this property and commit offenses while on the property. It is considered desirable to have such jurisdiction. On the other hand we fully recognize the fact that certain limitations have been placed upon the jurisdiction of the United States by virtue of certain treaties and agreements and that this jurisdiction may be further curtailed by future agreements. Certainly, we do not desire to arouse the suspicion of any foreign governments by the use of any language in this code which would appear to give the armed forces jurisdiction in excess of obligations which we have already or may in the future assume by treaty or agreement. In order that our intent be made perfectly clear, the following amendment was adopted: On page 5, line 18, at the beginning of subdivision (11) insert 'Subject to the provisions of any treaty

> or agreement to which the United States is or may be a party or to any accepted rule of international law,' and substitute a small a for the capital A in 'All'.
>
> "On page 5, line 24, insert the same amendment as in subdivision (11) and, in addition, on line 24 after 'by' insert 'or otherwise reserved or acquired for the use of'.
>
> "The adoption of the proposed amendments in subdivision (11) and (12) will insure that the armed forces will have jurisdiction over both leased areas and areas otherwise reserved or acquired for the use of the United States and it will also insure that such jurisdiction is subject to the limitations imposed in any treaty or agreement to which the United States is or may be a party."

It is impossible, without wrenching sentences out of context, to draw from the foregoing any intention to render conditional upon foreign consent the exercise of American military jurisdiction over American civilians.

And the actual exercise of American military jurisdiction over civilians has not involved consensual conditions. As we have pointed out (Covert Br. 95-97), the jurisdiction purportedly conferred by Art. 2(11), UCMJ, has in fact been exercised without reference to the terms of the agreements with foreign countries.

Briefly to summarize what is there set forth in detail, the Army has tried in Japan a merchant seaman who was not a member of the "civilian component" within the meaning of the Administrative Agreement with Japan (*United States* v. *Robertson*, 5 USCMA 806, 19 CMR 102); it has tried in France Polish nationals who had been employed in Germany and brought to France as members of a Labor Service Company (*United States* v. *Wiman*, 3 USCMA 216, 11 CMR 216); and it has tried in Eritrea the British wife of an American soldier, a woman who had to be paroled by the Attorney General in order that she might be admitted to the Federal Reformatory for Women

at Alderson to serve her life sentence (*United States v Brailhart*, CM376967, petition for grant of review denied, 6 USCMA 808; No. 6774[5]).

It is simply not possible, therefore, to deduce from the terms of Art. 2(11) the conditional exercise of jurisdiction that the Court found there last June. Congress did not assert a jurisdiction to be exercised over American civilians only if the territorial sovereign consented, but rather a jurisdiction that was to be exercised over all persons falling within the literal terms of the provision except if the territorial sovereign objected, whether on grounds of written or unwritten international law. The cases just cited are inexplicable otherwise.

Or, more briefly expressed, the "Subject to" clause that introduces Art. 2(11) is a limitation, and not a condition.

C. If, as a Matter of American Law, Including American Constitutional Law, American Courts-Martial Have No Jurisdiction to Try Particular Civilians, Such Courts-Martial Cannot by Treaty or International Agreement be Given a Wider Jurisdiction, for the Reason That No Treaty Can Prevail Over Specific Constitutional Guarantees, in This Instance the Right to Trial by Jury.

Consideration of the powers conferred upon the United States by treaty or international agreement becomes relevant only if it is concluded that, but for such treaty or agreement, the jurisdiction now in issue cannot be sustained. For, plainly, if the Constitution and laws of the United States, without more, support the trial of civilian women by court-martial in time of peace, it is not necessary to look further.

On the assumption put, that American domestic law does not sustain the present trials, then the military jurisdiction

[5] The *Brailhart* case has been the subject of questions in the British Parliament. 544 Parl. Deb. (H.C.), 5th Series, Written Answers to Questions, 205-206 (July 28, 1955); 546 *id.* 201-202 (30 Nov 1955).

ere asserted must, necessarily, rest on the terms of a reaty. Otherwise stated, it would then be the treaty or nternational agreement that confers upon the court nartial a jurisdiction to try civilians that it would not therwise have had. To that extent, therefore, it would e the treaty or agreement that withdraws from the Ameri an civilians accompanying the forces the right to jury rial that otherwise would have been theirs, and relegates nem to the class of those who cannot claim that right.

No treaty, no international agreement, so this Court as repeatedly said, can go that far; to that extent the reaty power is not unlimited. On that point there is no iversity in the authorities:

(a) "It need hardly be said that a treaty cannot change he Constitution or to be held valid if it be in violation of hat instrument. This results from the nature and funda mental principles of our government." *The Cherokee Tobacco*, 11 Wall. 616, 620 621.

(b) "* * * it must be assumed that the framers of the Constitution intended that [the power to make treaties] would extend to all those objects which in the intercourse f nations had usually been regarded as the proper sub ects of negotiations and treaty, if not inconsistent with he nature of our government and the relation between the tates and the United States." *Holden* v. *Joy*, 17 Wall. 211, 43.

(c) "The treaty power, as expressed in the Constitution, in terms unlimited except by those restraints which are ound in that instrument against the action of the gov rnment or of its departments, and those arising from he nature of the government itself and of that of the tates." *Geofroy* v. *Riggs*, 133 U.S. 258, 267.

(d) In *Missouri* v. *Holland*, 252 U.S. 416, 433, it was spe ifically noted that "The treaty in question does not con ravene any prohibitory words to be found in the Con itution."

(e) "The treaty making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids', it does extend to all proper subjects of negotiation between our government and other nations." *Asakura* v. *Seattle*, 265 U.S. 332, 341.

(f) The treaty power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320.

(g) Or, as Mr. Charles Evans Hughes summed up the matter in 1929, in the interval between his two terms of judicial service (*Proc. Am. Soc. Int. L., 1929*, p. 194),

> "I think it is perfectly idle to consider that the Supreme Court would ever hold that any treaty made in a constitutional manner in relation to the external concerns of the nation is beyond the power of the sovereignty of the United States or invalid under the Constitution of the United States where no express prohibition of the Constitution has been violated."

(h) Finally, only two terms ago, the Government urged on the Court these identical limitations on the treaty power. It said in *United States* v. *Capps*, 348 U.S. 296 (U.S. Br., No. 14, Oct. T. 1954, pp. 32, 49):

> "The basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights, which govern all exercise of governmental authority in this country.
>
> * * * * * *
>
> "Together with statutes and treaties, executive agreements are subject to the Bill of Rights and the other clauses of the Constitution which protect all Americans from the excesses of official authority."

If, therefore, the civilian women here concerned had a constitutional right to trial by jury as a matter of Amer-

lean law unaffected by treaty arrangements, then no agreement between the United States and any foreign nation, howsoever that agreement might have been effected, howsoever that agreement might have been expressed, could render them subject thereafter to trial by court martial. And in this connection the rose by some other name is not made less thorny when the treaty power is referred to (e.g., U.S. Supp. Br. 3) as "the powers of the United States in the conduct of foreign affairs." For the cases cited show that the United States is not empowered to conduct its foreign affairs in a manner that will violate specific constitutional guarantees.

Consequently, in resting its conclusion last June on the international arrangements between the United States and Japan, or between the United States and Great Britain, or between the United States and any other foreign country, the Court effectively contradicted its own denial (351 U.S. at 480) that "No question of the legal relation between treaties and the Constitution is presented."

Such a question can only be avoided if the existence or non-existence of the power to try these two civilian women by court-martial is bottomed squarely on the Constitution of the United States. If such power can be derived from that instrument, unaided by any exertion of the treaty power, unsupplemented by the terms of any agreement with a foreign nation, then the trials here in question were proper. If, on the other hand, no such power can be extracted from the Constitution, then the women here in question are entitled to their freedom forthwith, regardless of what any treaties or international agreements may have provided or assumed, and regardless of what foreign nations expect our military commanders to do (U.S. Supp. Br. 22 *et seq.*). American civilians are not to lose rights guaranteed them by the Constitution simply because such loss is found more convenient by foreign nations—or, for that matter, by our own Government.

It should always be remembered and just now, to judge from the tenor of the Government's Supplemental Brief, there seems to be some danger of forgetting it—that many significant portions of the Constitution were drafted and adopted in order to limit the powers of the Federal Government. Convenience is not the measure of constitutionality.

II. NOTHING IN THE CONSTITUTION OF THE UNITED STATES AUTHORIZES THE TRIAL OF CIVILIANS BY COURT-MARTIAL IN TIME OF PEACE AND NOT IN OCCUPIED TERRITORY

Not only is it not permissible for a treaty or international agreement to curtail personal rights specifically guaranteed by the Constitution, i.e., to evade or avoid limitations which that instrument has placed on the federal Government, but, put affirmatively, all power exerted by Congress must find a basis in the Constitution.

The opinion last June, which refers to a supposed cession or relinquishment of jurisdiction by foreign nations (351 U.S. at 473-474, 479) but points to no specific power conferred by the Constitution to sustain the trials in question, appears to overlook that principle, and so it may well be helpful if the earlier formulations by this Court were set forth in chronological order.

(a) *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326: "The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

(b) In *Ex parte Milligan*, 4 Wall. 2, every member of the Court had reached the same conclusion. Davis, J., for the majority, said (p. 119), "By that Constitution and the laws authorized by it, this question must be determined." And Chase, C. J., concurring in the judgment, said for himself and three others (pp. 136-137), "We agree in the proposition that no department of the Gov-

ernment of the United States—neither President, nor Congress, nor the courts—possesses any power not given by the Constitution."

(c) *Dorr v. United States*, 195 U.S. 138, 140: "It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government."

(d) *Graves v. O'Keefe*, 306 U.S. 466, 477: "* * * that government [i.e., the Federal government] derives its authority wholly from powers delegated to it by the constitution."

(e) *Ex parte Quirin*, 317 U.S. 1, 25: "Congress and the President, like the courts, possess no power not derived from the Constitution."

And so we examine the basic law to see whether, by any portion thereof, there is granted power to the federal government to try civilians by court-martial in time of peace. For if there is not, then no consent by any foreign country, no number of agreements with foreign countries, and no assumptions by American negotiators, can invest courts-martial with power that cannot be shown to have its origin in the Constitution.

A. The Power to Govern the Armed Forces Does Not Confer Any Power to Court-Martial Civilians in Time of Peace.

1. One hundred and seventy-five years of American history and experience, closely carrying forward the English heritage, establish that, outside of occupied territory where the laws of war apply, the only civilians who may constitutionally be tried by court-martial are those now included in Art. 2(10), UCMJ, viz., those who in time of war accompany the armed forces in the field.

The first problem presented by these cases is to fix the boundary between the civil and military jurisdiction of the United States, the line between those who can properly claim the right to a jury trial and those who

are subject to trial by court martial. In order to ascertain the precise location of that demarcation, we look to history, to the practical construction drawn from our whole national experience, and to those military trials that rest, not on the power to govern the armed forces but on other and distinct constitutional powers.

(a) Here, as in so many other constitutional situations, the starting point is Mr. Justice Holmes' admonition in *Gompers v. United States*, 233 U.S. 604, 610:

> "* * * the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."

And so we look first to the English Law as it stood at the time of the adoption of the Constitution, the more appropriately so in this instance since the original American Articles of War were taken verbatim from their British prototypes, as John Adams, who drafted them, recorded in his diary. 3 *Works of John Adams* (C. F. Adams ed. 1851) 68-69, 83-84.

It is unnecessary in this connection to determine whether the models for the first American Articles of War were the British Articles of 1765 or those of 1774 (cf. Davis, *A Treatise on the Military Law of the United States* (3d ed. 1915) 340-341, espy. 341, n. 1), inasmuch as the British provisions dealing with military jurisdiction over civilians were the same in both sets. They read as follows:

> "All Suttlers and Retainers to a Camp, and all Persons whatsoever, serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to Orders according to the Rules and Discipline of War."

(Section 14, Art. 23 of the British Articles of 1774, Davis, *supra*, p. 593; Section XIV, Art. XXIII of the British Articles of 1765, Winthrop *1461 [reprint, p. 941]).[6]

This provision, with the sole substitution of "armies of the United States" for "Our Armies", became Art. 23 of Section XIII of the American Code of 1776 (5 J. Cont. Cong. 788, 800; Winthrop, *1497 [reprint, p. 967]).

The scope of the British provision was plain; it was limited to functionally connected civilians "in the field", a phrase of art that meant in time of hostilities in a place where military operations were under way. And, as will be pointed out below, for nearly a century and a half the British provision paralleled the scope of the American one.

Unless a British civilian came within the terms of the quoted provision, he was not subject to military law. Thus, in *Wolton* v. *Gavin*, 16 Q. B. 48 (1850), Lord Campbell, C. J., said (p. 61), "I think * * * that none are bound by the Mutiny Act or the Articles of War except Her Majesty's forces; and I am most anxious, as a constitutional Judge, that this should be fully understood to be my opinion." And Erle, J., though dissenting on another point, noted (p. 70) that "It is conceded that the Mutiny Act and the Articles of War apply only to military men: * * *."

This was the scope of British military jurisdiction when, late in the XIX Century, the Mutiny Act was superseded, and Articles of War were no longer promulgated. Army

[6] The system of abbreviations used in this brief is identical with that explained in the "Glossary of Military Law Abbreviations" that faces p. 1, Covert Br.

The following additional abbreviations will be encountered below:

D/A	Department of the Army
GCMO	General Court-Martial Orders
GO	General Orders
WD	War Department

Discipline and Regulation Act, 42 & 43 Vict. c. 33; Army Act, 1881, 44 & 45 Vict. c. 58.

The latter measure, now known simply as the Army Act, is annually reenacted in compliance with British constitutional principles,[1] and, by such reenactment is from time to time amended. Under the Army Act, as it was in force down to the end of 1956, certain civilians, not otherwise subject to military law, were so subject as officers if one "accompanies in an official capacity equivalent to that of an officer any of [Her] Majesty's troops on active service in any place" (§ 175(7)); and the following were so subject as soldiers: "All persons not otherwise subject to military law who are followers of or accompany [Her] Majesty's troops, or any portion thereof, when employed on active service:" § 176(10). The expression "on active service" was defined by § 189(1) to mean "whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country." See *Manual of Military Law, 1951* (H.M.S.O.) 392, 395, 414, giving the text of the Army Act as it then stood.

That is to say, under the British military code, accompanying civilians in occupied territory were subject to military law. Other accompanying civilians were subject thereto only when the force which they accompanied was engaged in military operations.

That jurisdiction, thus limited until just the other day, was, under the first heading, identical with that exercised

[1] "This act of 1881—the Army Act of 1881—now governs the army. But it is an act of a very peculiar character—it always requires another act to keep it in force—and in every session of parliament a brief act is passed renewing the act of 1881. This was but a change in parliamentary procedure, the principle is still preserved that the army shall be legalized only from year to year." Maitland, *The Constitutional History of England*, 448.

by American general courts-martial over civilians in occupied territory, under the war power conferred by AW 12 of 1916 through 1948 and Art. 18, UCMJ (Covert Br. 69-76). Under the second heading, it was the same, with reference to time and place of exercise, as the jurisdiction of American courts martial over civilians who were serving with the forces "in the field" under Art. 2(10), UCMJ, and under its predecessor provisions from the beginning (Covert Br. 42-47; Krueger Br. 12-16).

Since both countries had a common military constitutional heritage, namely, the common background of implacable hostility to excesses of military authority (*infra*, pp. 120-125), since the written military code of each had an identical starting point, it is therefore hardly surprising that in both countries the boundary between civil and military jurisdiction remained similarly identical for so many, many years.

It is only since January 1, 1957, that accompanying civilians have become subject to British military law under conditions other than "on active service," and even then there are disciplinary provisions which are in terms inapplicable to them. See The Army Act, 1955 (3 & 4 Eliz. II, c. 18) §§ 209, 213, and Fifth Schedule; The Air Force Act, 1955 (3 & 4 Eliz. II, c. 19), §§ 209, 211, and Fifth Schedule.* But since, of course, the British Parliament is not subject to constitutional restrictions, the traditional boundaries of British military jurisdiction are far more significant in the present connection than this very recent expansion can possibly be. Thus, British military law has a recapture provision similar to the now unconstitutional Art. 3(a), UCMJ. See *Toth v. Quarles*, 350 U.S. 11, 29-31, note 11.

(b) We end this digression to return to examine the development of American military jurisdiction.

* These measures came into force by, respectively, the Army Act, 1955 (Commencement) Order and the Air Force Act, 1955 (Commencement) Order (S.I. 1955 Nos. 1805, 1806).

American Articles of War, from 1775 up to 1916, followed faithfully the limitation written into the British Articles on which they were modeled: the only civilians triable by court-martial were those who accompanied the forces in the field. AW XXXII of 1775; Sec. XIII, Art. 23, of 1776; AW 60 of 1806; AW 63 of 1874. And "in the field" was uniformly construed, with only a few aberrations in World War I, since legislatively repudiated, as limited to the actual theatre of hostilities, in wars declared or undeclared. Covert Br. 39-41, 42-47; Krueger Br. 12-16.

The Articles of Confederation dealing with the power now in question in effect simply ratified what the Continental Congress had already done. The 4th paragraph of Art. IX provided that "The United States in Congress assembled shall also have the sole and exclusive right and power of * * * making rules for the government and regulation of the said land and naval forces, * * *"

What is now Clause 14 of Article I, Section 8, of the Constitution evoked no comment in the course of its inclusion. A draft in Randolph's hand, in the papers relating to the work of the Committee of Detail, enumerated among the powers proposed to be conferred upon the legislature the power (2 Farrand, *Records of the Federal Convention*, 137, 144) "15. To enact articles of war." On August 18, 1787, Clause 14 was adopted, in its present form (2 Farrand 323, 330, 333), and only Madison troubled to note, what was indeed self-evident, that (*id.* at 330) the new clause was "added from the existing Articles of Confederation."

Since nothing was said as to the scope of "land and naval Forces," it seems fair to assume that this expression included only those persons mentioned in the Articles of War then in force,[9] namely, those actually in a military

[9] A number of additional articles had been adopted by the Continental Congress after 1776, notably in 1786. Winthrop, *13-14, *1504-1508 (reprint, pp. 22-23, 972-975).

status and those civilians serving with the forces in the field. If a wider content had been intended, or even contemplated, surely some voice would have been raised in protest.

It is essential in this connection to bear in mind the vigor and hostility of contemporary feeling against any form of permanent military force. In the Convention, Gerry attempted, for all time, to limit the standing army to two or three thousand men. 2 Farrand 323, 329, 330; Warren, *The Making of the Constitution*, 482-484. One of George Mason's reasons for not signing the Constitution was that it did not protect against the danger of standing armies in time of peace. 2 Farrand 640. Cf. 3 *id.* 207 (Luther Martin).

In the ratification process, Hamilton had to devote four numbers of *The Federalist*—23, 24, 25, 41—to a justification of the army clause. Even so, a number of the states proposed declarations of rights asserting that standing armies in time of peace were dangerous to liberty (1 Elliot's *Debates* 335 [No. XVII, Rhode Island]; 3 *id.* 660 [No. 17, Virginia]; 4 *id.* 244 [No. 17 North Carolina]), and some states proposed amendments against such forces in the absence of a two-thirds vote by Congress (3 *id.* 660 [No. 9, Virginia]; 4 *id.* 245 [No. 9, North Carolina]), or even at all (1 *id.* 336 [No. XII, Rhode Island]). Compare 1 *id.* 328 (New York, no standing army except in cases of necessity); 2 *id.* 552 (Maryland, no mutiny bill to continue in force longer than two years).

And the enactments of the first Congress for a virtually miniscule force (Act of Sept. 29, 1789, c. 25, 1 Stat. 95; Act of April 30, 1790, c. 10, 1 Stat. 119) were assailed by some of the members as utterly unconstitutional (*The Journal of William Maclay* (1927 ed.) 221, 235).

In that setting, if "land and naval Forces" had ever been intended as—or even suspected of being capable

of interpretation as—"a broad grant susceptible of expansion under changing circumstances" (352 U.S. at 902), if, specifically, it could ever have been imagined as wide enough to include the wives and dependents of such forces in time of peace, it is inconceivable that this possibility would have been passed over in silence by all of the articulate anti-Federalists, as in fact it was.

Certainly it is not possible, without palpable misreading, to find any basis for such an expansion in what Hamilton wrote in No. 23 of *The Federalist*.

Let us take the passages that the Government (U.S. Supp. Br. 70) has italicized:

> (i) "* * * to raise armies; to build and equip fleets; *to prescribe rules for the government of both;* * * *"*

The antecedents of the word "both", plainly enough, are "armies" and "fleets". How can that possibly suggest the inclusion of civilian dependents?

> (ii) "*These powers ought to exist without limitation; because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*"

"These powers" and "them," again, refer to the powers to raise armies, to build fleets, "to prescribe rules for the government of both," and to direct their operations and to provide for their support. But to suggest that the language means that "land and naval Forces" must be read as including civilian dependents plainly begs the question.

> (iii) "Are fleets and armies, and revenues, necessary for this purpose? The government of the union must be empowered to pass all laws, *and to make all regulations which have relation to them.*"

What was meant by "them"? As a matter of grammar, "them" could only have referred to "fleets and armies,

and revenues." Conceding (U.S. Supp. Br. 71) that "Hamilton was a distinguished army officer who undoubtedly knew that civilians under certain circumstances were subject to court-martial jurisdiction," there is certainly nothing in any of the passages quoted, which presumably are the strongest that concerted, cooperative research could discover, to show that he ever envisaged extending military jurisdiction over any civilians not within the British or Continental Articles of War, viz., the narrow class of functionally connected persons in the area of hostilities in time of actual hostilities. And none of the voluble opponents of the new Constitution, who assuredly were not without resourcefulness in predicting horribles of an imaginary nature, appear to have thought so either.

Moreover, as will be pointed out, below, pp. 44-45, Hamilton's contemporaneous exposition of the Necessary and Proper Clause did not by any stretch of language or imagination suggest a wider scope for military jurisdiction over civilians. And the interpretation and practice of the military authorities for over a century and a quarter thereafter is consistent only with the view that the boundary between civil and military jurisdiction had been irrevocably fixed by the Constitution.

In this connection, it is to be noted that the jurisdiction exercised by the Continental Congress over civilians who were spies or who trafficked with the enemy (U.S. Supp. Br. 77-78) was, as *Ex parte Quirin*, 317 U.S. 1, shows, legislation defining war offenses and directed at offenders against the laws of war. And Winthrop's authoritative discussion of the scope of such provisions shows (*138-*142 [reprint, pp. 102-104]) that this war jurisdiction "must be understood to be limited to acts committed on the theatre of war or within the scope of martial law." Here again, the precedents do not help the Government in the present cases.

(c) If, as this Court has done on another occasion (*Ex parte Quirin*, 317 U.S. 1, 35), we look to the "long

course of practical administrative construction by [the Government's] military authorities," then it is plain that the power to make rules and regulations for the government of the land and naval forces does not include the power to court-martial wives of the members of those forces.

As has already been pointed out at great length, Covert Br. 42-52; Krueger Br. 12-16, the only civilians ever tried by court-martial prior to 1916, no matter how functionally connected with the forces, were those who accompanied those forces "in the field" in time of war, declared or otherwise—and "in the field" was always construed to mean a theater of operations where hostilities were in progress.

Indeed, since AW 63 of 1874 and its predecessors were restricted to retainers to the camp and to those "*serving with* the armies of the United States in the field," it covered only individuals whose duties had some functional connection with the armies. Winthrop *131-137 (reprint, pp. 98-101).

We will not repeat or reprint the authorities set forth there or in the earlier briefs. But it is not without interest that, in *Madsen* v. *Kinsella*, 343 U.S. 341, the Government, after thorough consideration of the authorities, came to precisely the same conclusion that we do as to the extent of the pre-1916 court-martial jurisdiction over civilians. Here are pertinent extracts from its brief (No. 411, Oct. T. 1951):

> "* * * we will demonstrate that courts martial probably never possessed jurisdiction over the wives and dependents of a soldier, or over any civilian except during a time and in the vicinity of military operations, and that, in any event, prior to 1916 courts martial never had jurisdiction to try a soldier's wife or any other civilians for murder or any of the other serious civil crimes enumerated in Art. 58 of the pre-1916 Articles of War." (p. 30)

> "Petitioner's contention that the wives of soldiers were subject to trial by court martial prior to 1916 under the former AW 63 [of 1874; Winthrop, *1531 (reprint, p. 991)] is inconsistent with the terms and construction of that article, and is based upon dubious authority." (p. 44)

Particular attention is directed to Point 1B2 of that brief (pp. 40-45), which bears the heading, "Prior to 1916, courts martial probably lacked jurisdiction over any civilians except in an area of combat operations, and clearly were without jurisdiction over soldiers' dependents bearing no relationship to the army as a fighting force." We commend that discussion to the Court, not by way of debating point, not to impeach an adversary with prior inconsistent statements, but because those pages contain a reasoned and accurate exposition of the pre-1916 military jurisdiction over civilians, and because the conclusions there set forth are those which any objective lawyer, familiar with the materials, is bound to reach.

The Government's present brief on the same point is permeated by a significant dualism. On the one hand, there is grudging recognition that AW 2(d) of 1916 involved an expansion of the class of civilians who were declared to be subject to military law (U.S. Supp. Br. 80). On the other hand, there is an apparent refusal to concede that the pre-1916 court-martial jurisdiction was a very limited one, narrowly circumscribed as to time, place, and functional connection, and the argument is that since some civilians were subject to military law in 1789, it does no violence to the Constitution to include a few more (U.S. Supp. Br. 76-82). But those contentions entirely overlook the circumstance that every expansion of court-martial jurisdiction necessarily contracts—and infringes—the double guarantee of jury trial.

(d) The foregoing consistent practice, over a period of well over a century, from 1775 to 1916—and, so far as dependent wives are concerned, from 1775 to 1950—prac-

tice that was primarily formulated by the very military authorities whose jurisdiction was in question, and that was uniformly concurred in by the law officers of the Government, fixes in definitive fashion the scope of the military jurisdiction, and, on the other side of the boundary, the extent of the guarantee of jury trial.

The foregoing conclusion follows on any of three independent approaches:

First. A settled construction of the Constitution, at first contemporaneous with its adoption, and then followed by practice, usage, and acquiescence over a long period is not only of very great weight, but may be well nigh conclusive. E.g., *Stuart* v. *Laird*, 1 Cranch 299, 309; *Murray* v. *Hoboken Land Co.*, 18 How. 272, 279-280; *Burrow Giles Co.* v. *Sarony*, 111 U.S. 53, 57; *Hampton & Co.* v. *United States*, 276 U.S. 394, 412. Or, as it was phrased with characteristic felicity by Mr. Justice (then Chief Judge) Cardozo, "Not lightly vacated is the verdict of quiescent years." *Coler* v. *Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884.

Second. In ascertaining who may successfully claim the right of trial by jury, we look to see who, by common understanding, had that right in 1789. See, e.g., *Callan* v. *Wilson*, 127 U.S. 540; *In re Debs*, 158 U.S. 564; *District of Columbia* v. *Colts*, 282 U.S. 63; *District of Columbia* v. *Clawans*, 300 U.S. 617; *Ex parte Quirin*, 317 U.S. 1, 38-41; *Whelchel* v. *McDonald*, 340 U.S. 122, 126-127.

Third. In every instance that an attempt to enlarge the scope of military jurisdiction at the expense of trial by jury as it existed in 1789 has come before this Court, that attempt has failed. *Ex parte Milligan*, 4 Wall. 2; *Duncan* v. *Kahanamoku*, 327 U.S. 304; *Toth* v. *Quarles*, 350 U.S. 11.

Howsoever the problem is viewed, therefore, the conclusion is always the same. These wives cannot be sub-

jected to trial by court martial by reason of anything in Clause 14 of Section 8 of Article I.

(c) Needless to say, none of the foregoing has any application to occupied territory, where the laws of war prevail. *Madsen* v. *Kinsella*, 343 U.S. 341; and see the detailed references collected at Covert Br. 69-76.

2. Nothing in the Necessary and Proper Clause, either as a matter of construction or of application over the years, enlarges the scope of "land and naval Forces" in Clause 14, essentially because any such enlargement would necessarily—and improperly—restrict the class of persons falling within the dual constitutional guarantee of jury trial.

The Necessary and Proper Clause of the Constitution (Art. I, Sec. 8, Cl. 18—was not, so far as the records reveal, much discussed in the Convention. See 2 Farrand 168, 182, 344-345. It is true that three members, Edmund Randolph, Elbridge Gerry, and George Mason, refused to sign the final draft of the Constitution because they felt that this clause would too greatly expand the powers of Congress, a danger particularly to be feared in the absence of any Bill of Rights. 2 Farrand 563, 633, 640.

Thus, included in Mason's "Objections to this Constitution of Government," September 15, 1787, was the following (2 Farrand 637, 640):

> "Under their own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their powers as far as they shall think proper; so that the State legislatures have no security for the powers now presumed to remain to them, or the people for their rights.
>
> "There is no declaration of any kind, for preserving the liberty of the press, or the trial by jury in civil causes; nor against the danger of standing armies in time of peace."

The objections of Randolph and Gerry (2 Farrand 563, 633) were similar in tenor, and it is significant that Gerry, that inveterate anti-militarist, who in 1784 had proposed to the Continental Congress a resolution solemnly declaring (27 J. Cont. Cong. 518) that "standing armies in time of peace, are inconsistent with the principles of republican Governments, dangerous to the liberties of a free people, and generally converted into destructive engines for establishing despotism," and who in 1787 had desired to limit the peace time standing army for all time to two or three thousand men (*supra*, p. 37), never intimated that his objection to the Necessary and Proper Clause was based on any possibility that it might be resorted to in an endeavor to subject to military jurisdiction a class of civilians who had not customarily and traditionally been so subjected.

Hamilton's defense of the Necessary and Proper Clause was hardly calculated to suggest any such possibility; here is what was written concerning that provision in No. 33 of *The Federalist*:

> "But Suspicion may ask, Why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The Convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it: as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of that provision to declare."

Even when read together with those passages from No. 23 that the Government now quotes (U.S. Supp. Br. 70-71),

and, as we show, misreads, *supra*, pp. 38-39), there is nothing in this contemporaneous exposition of the Necessary and Proper Clause that would lead "Suspicion", in the shape of the many opponents of the new Constitution, to think that, by expanding the content of Clause 14, Clause 18 would be able correspondingly to abridge the guarantee of jury trial already contained in Section 2 of Article III. And assurances from other quarters were similar in tenor to Hamilton's.

Thus, James Wilson, later a Justice of this Court, said in the Pennsylvania Convention (2 Elliot 468):

> "* * * and even the concluding clause, with which so much fault has been found, gives no more or other powers; nor does it, in any degree, go beyond the particular enumeration; for, when it is said that Congress shall have power to make all laws which shall be necessary and proper, those words are limited and defined by the following, 'for carrying into execution the foregoing powers.' It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution."

Similarly, Randolph told the members of the Virginia ratifying convention (3 Elliot 206):

> "The sweeping clause, as it is called, is much dreaded. I find that I differ from several gentlemen on this point. This formidable clause does not in the least increase the powers of Congress. It is only inserted, for greater caution, and to prevent the possibility of encroaching upon the powers of Congress. No sophistry will be permitted to be used to explain away any of those powers; nor can they possibly assume any other power, but what is contained in the Constitution, without absolute usurpation."

After the Constitution went into effect, Congress made provision for a small standing Army, primarily for defense against Indian attacks. The Continental Articles of War (1775, pp. 22-23, 26) were twice continued in force

the second time "as far as the same may be applicable to the constitution of the United States." Sec. 4 of the Act of Sept. 29, 1789, *supra*, 1 Stat. at 96; Sec. 13 of the Act of April 30, 1790, *supra*, 1 Stat. at 121.

In ascertaining whether the Clause 14 "power, as modified by the Necessary and Proper Clause, was considered a broad grant susceptible of expansion under changing circumstances" (352 U.S. at 902), it is demonstrable that the literal construction of the clauses involved, the practice of a century and a half, and the decisions of this Court, all coincide in answering the stated inquiry in the negative.

First. As has been pointed out (Covert Br. 76-81), nothing in the Fifth Amendment enlarges the grant of court-martial jurisdiction in Clause 14; not only because nothing in the first ten Amendments, which were designed as limitations on the new Federal government, could possibly have enlarged any substantive powers granted to that government by the Constitution, but also because, as a matter of language and textual history, the true meaning of "cases arising in the land and naval forces" in the Fifth Amendment is, "cases arising in the government of the land and naval forces."[19]

It is significant in this connection that the exception in the Fifth Amendment does not suggest that the scope of "land and naval forces" could properly be broadened by anything in Clause 18. Certainly when the Bill of Rights was passing through the First Congress, the members must have been aware of the discussions of the Necessary and Proper Clause which the ratification process had evoked. But neither they nor the other proponents of Bills of Rights (Covert Br. 79) ever suggested an exception reading "except cases arising in the land and naval forces as that term may hereafter be expanded when from

[19] In accord with the analysis at Covert Br. 78-81 is Chase, C. J., concurring in *Ex parte Milligan*, 4 Wall. 2, 138.

time to time deemed necessary and proper", or couched in equivalent language.

There is no basis in any of the contemporary materials or in any inferences that can properly be drawn from such materials that anyone, in 1787, or 1789, or 1791, ever for a moment considered that the concept of "land and naval Forces" in Clause 14 could be broadened beyond the class of those then subject to trial by court-martial, viz., those actually in the service, and those few functionally connected civilians who served with them "in the field", i.e., in an area of operations during a period of hostilities.

Second. For almost a century after Chief Justice Marshall first demonstrated the potentialities of the Necessary and Proper Clause in *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), it never occurred to any military men that Clause 18 enlarged the scope of "land and naval Forces" in Clause 14, or to read *The Federalist* as the Government now does (U.S. Supp. Br. 69-71). There were ample opportunities for suggesting the enlargement, notably in the instance of the post trader, who was so closely connected functionally with the Army's operations in the Indian country in the West. If the Government's present arguments (U.S. Supp. Br. 76-82) were sound, then the post trader would have been amenable to military law. But the actual holding was that he was not, and could not be made, so subject. See Covert Br. 45-47. Never, until 1916, was any attempt made to enlarge the class of civilians made subject to military law, and neither at that time nor thereafter was the expansion sought to be rested on the Necessary and Proper Clause. Indeed, as we show below, pp. 54-58, no constitutional justification for the expansion was ever offered.

It does not follow that because "land and naval Forces" has a fixed content with respect to those persons who may constitutionally be tried by courts-martial that the Constitution restricts warfare to the use of either the

weapons or the personnel that achieved American independence in 1775-1783.

Thus, nothing in the concept of "land * * * Forces" precludes the fullest utilization of advances in technology. The Army was first provided a Signal Officer in 1860 (Act of June 21, 1860, c. 163, 12 Stat. 64, 66), and a full fledged Signal Corps a few years later (Sec. 17 of the Act of March 3, 1863, c. 79, 12 Stat. 244, 753). The Civil War likewise saw the first extensive military use of railroads (see *Reminiscences of General Haupt* [Director of U. S. Military Railroads, 1862-1863]).

Military aviation dates from the establishment of an Aeronautical Division in the Office of the Chief Signal Officer in 1907 (*The Army Almanac* [1950] 211), and of the Aviation Section of the Signal Corps by the Act of July 18, 1914, c. 186, 38 Stat. 514. The First World War brought tanks (GO 80, WD, 1918; Act of July 11, 1919, c. 8, 41 Stat. 104, 129) and chemical warfare (GO 139, WD, 1917; GO 80, WD, 1918; Act of July 11, 1919, *supra*, at 129). Atomic weapons were developed and used by the Army in World War II (*The Army Almanac*, 867-869; Baxter, *Scientists against Time*, 438-447). Today we live in an age of guided missiles and Pentomic divisions.

Just as the Commerce Clause drafted in 1787 is ample for the regulation of railroads, radio, and television, so the military clauses of the Constitution are broad enough to encompass new weapons and ever more destructive methods of warfare. We would not for a moment contend that the United States Air Force has no power to court-martial airmen simply because the Framers did not envisage aircraft.[13] But we put that power, not on the ground that "land and naval Forces" was envisaged as having an expansible content as to the class of persons included

[13] Such a contention is actually being put forward, with apparent seriousness, in *Atkinson* v. *Quarles*, No. 13446 in the U.S. Court of Appeals for the D. C. Circuit.

therein (U.S. Supp. Br. 15, 75) the materials collected above, pp. 36-47, show clearly that it was not but because, since the Army had power to try its aviators by court-martial while they were members, successively, of the Aviation Section of the Signal Corps, the Air Service, the Air Corps, and the Army Air Forces, that power did not disappear when Congress, for administrative and military reasons, reconstituted the identical military personnel on a basis of complete autonomy as the United States Air Force by the National Security Act of 1947, c. 343, 61 Stat. 495.

Nor do we contend that women regularly in the military service cannot be subjected to military law. Thus, nurses were originally civilian employees (see Sec. 5 of the Act of March 16, 1802, c. 9, 2 Stat. 132, 134; GO 120, WD, 1900). They were first militarized by Sec. 19 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 753; for later legislation, see Ch. V of the Act of July 9, 1918, c. 143, 40 Stat. 845, 879; and Army-Navy Nurses Act of April 16, 1947, c. 38, 61 Stat. 41. Similarly, the first women in the Army, the Women's Army Auxiliary Corps, were not subject to military law except overseas. Sec. 14 of the Act of May 14, 1942, c. 312, 56 Stat. 278, 281. Later however, as the Women's Army Corps, they were given full military status (Act of July 1, 1943, c. 187, 57 Stat. 371), and in 1948 they were integrated into the Regular Army. Women's Armed Services Integration Act of June 12, 1948, c. 449, 62 Stat. 356. Plainly, these women are subject to military law even though the only embattled Amazon known to the Founders was Molly Pitcher at the Battle of Monmouth.

What we do urge is that the question of amenability to military law rests, not on weapons, not on sex, not on technological advances, but on status: Persons in the service are subject to military law, persons not in the

service are not. *Accord*: Winthrop, *145 (reprint, p. 106).[12]

Third. The true reason why the class of persons triable by court-martial under Clause 14 has never been deemed enlarged by the Necessary and Proper Clause is that any such enlargement would correspondingly contract the class of civilians who could claim the dual constitutional guarantee of jury trial. Since, as this Court has repeatedly held (*Callan* v. *Wilson*, 127 U.S. 540; *Thompson* v. *Utah*, 170 U.S. 343; *Rassmussen* v. *United States*, 197 U.S. 516; *Patton* v. *United States*, 281 U.S. 276; *District of Columbia* v. *Colts*, 282 U.S. 63; cf. *Andres* v. *United States*, 333 U.S. 740), the right to a jury trial preserves the incidents and the scope of such trial as both stood in 1789, there could be no room for Clause 18 to operate by enlarging the content of "land and naval Forces" in Clause 14. Both provisions were necessarily limited by the provisions for jury trial in Art. III, § 2, and in the Sixth Amendment. All four provisions must be construed together (*Prout* v. *Starr*, 188 U.S. 537, 543-544; cf. *Knowlton* v. *Moore*, 178 U.S. 41), and they can be construed together only by carrying forward without change the boundary between civil and military jurisdiction as that boundary had been acknowledged and established in 1789.

The basic fallacy underlying the Government's arguments (U.S. Supp. Br. 10, 76-80) is that they treat the extension of court-martial jurisdiction over civilians as a matter of legislative judgment, needing only a rational basis, as though some question of substantive due process

[12] It is status, rather than wearing of the uniform, that explains *Johnson* v. *Sayre*, 158 U.S. 109, a case somewhat haltingly put forward at U.S. Supp. Br. 80. The Court there held that, since a paymaster's clerk in the Navy was for some purposes an officer (*United States* v. *Hendee*, 124 U.S. 309), he was (p. 117) "a person in the naval service of the United States." But *Johnson* v. *Sayre* hardly supports the proposition that the dependent wives of naval personnel are similarly in the naval service.

were alone involved, and that they completely ignore, what would seem to be obvious to any disinterested observer, that every such extension necessarily involves a corresponding contraction of the right to trial by jury. This cavalier approach reaches its apogee in the statement (U.S. Supp. Br. 79) that "the Federal Constitution * * * has no prohibition against the extension of court martial jurisdiction * * *."

Is the Solicitor General really this unaware of Art. III, Sec. 2, and of the Sixth Amendment?

It is noteworthy in this connection that in no other instance and in no other case under the Necessary and Proper Clause has that clause been relied upon, or held, to impinge upon a single personal guarantee contained in the Bill of Rights. True, Congressional power has been enlarged; obstructions to the exercise of such enlarged power have been prevented and punished; and with each increase of Federal power there has necessarily been a corresponding diminution of the power of the several States. Were it otherwise, as Marshall wrote Story a month after *M'Culloch* v. *Maryland*, "the Constitution would be converted into the old Confederation" (14 *Proc. Mass. Hist. Soc.*, 2d series, 325). But never, in any decision of this Court of which we are aware, has the operation of the Necessary and Proper Clause been permitted to erode a single one of those personal liberties that were and are guaranteed by the first eight Amendments.

The distinction is well illustrated by *McKinley* v. *United States*, 249 U.S. 399. During World War I, Congress authorized the Secretary of War to make regulations to suppress houses of ill-fame in the vicinity of military camps, and plaintiffs in error were convicted of keeping such a house within 5 miles of a camp, in violation of the regulations. Plainly, since Congress is empowered to raise and support armies, it may do whatever is necessary to protect the health and welfare of those armies, however

much its legislation and the regulations promulgated pursuant thereto might impinge on what would otherwise (*Keller v. United States*, 213 U.S. 138) be the subject of the police power of the States exclusively. This Court accordingly sustained the conviction. But it does not follow that the Necessary and Proper Clause could empower Congress to subject the keeper of the house of ill fame, or its inmates, to trial by court-martial.

The distinction is further illustrated by the Espionage Act cases of World War I, which upheld convictions for attempts to obstruct recruiting by words of persuasion (*Schenck v. United States*, 249 U.S. 47; *Frohwerk v. United States*, 249 U.S. 204), inciting to insubordination (*Debs v. United States*, 249 U.S. 211), and spreading false reports to promote the success of the enemy (*Schaefer v. United States*, 251 U.S. 466). See also *Abrams v. United States*, 250 U.S. 616. The constitutional basis of the foregoing cases—apart from the scope of the First Amendment, which divided the Court in the last two decisions cited—was that since Congress had power to raise and support armies and to declare war, it had in addition all power necessary and proper to carry those enumerated powers into execution by punishing obstructions to their exercise. Here again, it does not follow that the Necessary and Proper Clause empowered Congress to try the defendants in question by court-martial—and in this instance such a course was actually put forward.

In April 1918, Senator Chamberlain, then Chairman of the Committee on Military Affairs, introduced a bill that proposed to declare to be spies, triable by court-martial or military commission, and punishable by death, "any person * * * who shall, anywhere in the United States, in time of war, endanger or interfere with the * * * successful operations of the land or naval forces of the United States, (a) by causing or attempting to cause insubordination * * * or (b) by delivering or transmitting * * * to any member of such land and naval forces any written or

printed matter which shall support or favor the cause of the enemy countries or of its allies in the war, or which shall contain any false reports or false statements intended to interfere with the successful operation of such land or naval forces, or (e) by printing or publishing any such printed matter * * *." S. 4364, 65th Cong., 2d sess. See 56 Cong. Rec. 5120, 5401-5402, 5471-5472.

President Wilson wrote of the measure, "I think that it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America * * *." That killed the bill. Rankin, *When Civil Law Fails*, 138-139.

These illustrations, show, we think, both the scope and the limitations of the "Necessary and Proper Clause." Nothing in that clause, we submit, can operate to extend the scope of trial by court martial at the expense of the guarantee of jury trial.

Fourth. The development of the Necessary and Proper Clause has adhered closely to what was foreshadowed for it in Chief Justice Marshall's original exposition (*McCulloch v. Maryland*, 4 Wheat. 316, 421),

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Yet this seminal passage demonstrates precisely why it was that for over a century no one sought in reliance on the Necessary and Proper Clause to enlarge the scope of "land and naval Forces" in Clause 14, and why such an effort must fail today.

To deprive of the right to jury trial a group of civilians who had that right in 1789 and who were never sought to be denied it for over a century and a quarter thereafter

Is not a legitimate end;

Is not within the scope of the Constitution,

Is twice prohibited by the Constitution; and

Is wholly inconsistent with the spirit of the Constitution.

Fifth. Only last Term, this Court considered the precise question here involved, viz., whether the grant of court-martial jurisdiction in Clause 14 was enlarged by anything in the Necessary and Proper Clause. It answered that question with a resounding negative. *Toth* v. *Quarles*, 350 U.S. 11. As was there said (pp. 21-22):

> "None of the other reasons suggested by the Government are sufficient to justify a broad construction of the constitutional grant of power to Congress to regulate the armed forces. That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause."

The materials collected under the present heading demonstrate conclusively that the foregoing holding accords with both the letter and the spirit of the Constitution. And the Government's present arguments, once the slurring over of historical facts and the misread sentences now found therein are eliminated, adduce nothing of substance to the contrary.

3. Significantly enough, the power purportedly conferred by Art. 2(11), UCMJ, under which the present prosecutions were instituted, has never been sought to be constitutionally justified in any legislative discussion, and was not rested on Clause 14, with or without Clause 18, in this Court's opinion last June.

The scope of court-martial jurisdiction over civilians as it stood until the effective date of the 1916 Articles of War was that set forth in AW 63 of 1874, which was part of R. S. § 1342 (Winthrop, * 1531 [reprint, p. 991]):

> "All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."[13]

The expansion of military jurisdiction effected in 1916 is shown by AW 2(d):

> "(d). All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;"[14]

Thus there was enacted a double expansion of military jurisdiction. First, civilians serving with the armies were included for times and places other than "in the field" in time of war or hostilities. Second, civilians who were merely accompanying the armies, and not actually serving with them, were also included.

"Serving" had been uniformly construed to imply some functional connection with the forces; see the many instances enumerated in Winthrop at *134-*135 (reprint, pp. 99-100). "Accompanying", on the other hand, necessarily implied mere physical presence, and therefore was a further stage removed from "land and naval Forces." A person serving with those forces might arguably be deemed a "part" of them, at least for some purposes, cf. *Toth* v. *Quarles*, 350 U.S. at 15. But a person simply physically present and having no functional connection with them could hardly be so designated.

---

[13] For earlier forms of the text, see U. S. Reid Br. 33 and Covert Br. 43.

[14] The introductory paragraph of AW 2 of 1916 is set forth at Covert Br. 124.

Neither extension, however, was sought to be justified on constitutional grounds, nor was any constitutional argument ever even articulated in the cause of the legislative process, in 1916, in 1920, in 1948, or in 1949-50; see the extensive references collected at Covert Br. 52-60, 64-65.

It is meaningless to say (351 U.S. at 478) that the Code "was adopted by Congress only after an exhaustive study of several years duration and the consultation of acknowledged authorities in the fields of constitutional and military law," when it is perfectly plain from the mass of legislative materials available, including the studies and drafts preliminary to the first bills introduced, that no one gave any thought, much less any study, to the central constitutional problem of the present cases.

We know that the Chairman of the Secretary of Defense's Committee on the Code, Prof. E. M. Morgan, was on record in print as resting the asserted camp-follower jurisdiction on the words of the Fifth Amendment. Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 107. We know from that published paper that his conclusion was not buttressed by any citation of authority. We also know that the *Manual for Courts-Martial*, ever since the 1890's, had pointed to the Fifth Amendment as a source of military jurisdiction, and that this view had some support in lower court decisions. Covert Br. 77.

Indeed, the tacit and, so far as the legislative history is concerned, wholly inarticulate premise on which all proceeded was not undercut until the decision in *Toth* v. *Quarles*, 350 U.S. 11, which established, what indeed should have been apparent to all, that nothing in the Bill of Rights, which was designed to limit the powers of the United States that had been granted in the Constitution proper, could possibly expand those powers.

We do not mean to disparage those who overlooked what now appears obvious from the superior vantage point of

hindsight.[15] We do say, however, that it is hardly helpful to suggest that there is any merit in having had under long consideration a question that plainly was not studied, or to urge that a conclusion based on demonstrable lack of inquiry becomes sounder when those who failed to examine what is now in issue may possibly have had, as to other questions that they did in fact study, the status of "acknowledged authorities."

Indeed, the attempt to shore up the validity of Art. 2(11) by reference to the supposed personal qualities of its draftsmen breaks down utterly when it is recalled that these gentlemen justified their inclusion of Alaska west of Long 170° West with its provisions, on the ground that there, in the far Aleutians, "a civil court system is not readily available" (*supra*, p. 21). Such a profound unawareness of *Rassmussen v. United States*, 197 U.S. 516, which plainly held that the guarantee of jury trial extended to all of Alaska, suggests that any further evaluation of the draftsmen's qualifications could only be invidious.

It seems to us significant that the present trials by court-martial were not rested on Clause 14, either with or without Clause 18, in this Court's opinion last June. After all, *Toth v. Quarles*, 350 U.S. 11, then just recently decided, had squarely held (at 15) that the Clause 14 power "would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces," and had further held (at 21-23) that the Clause 14 power is not broadened by Clause 18 and is to be narrowly limited to "*the least possible power adequate to the end proposed.*" Moreover, the mass of military and legislative materials

[15] Thus, in Underhill, *Jurisdiction of Military Tribunals in the United States Over Civilians*, 12 Calif. L. Rev. 75, the discussion of what civilians are subject to military law proper (pp. 75-90) is consistently couched in terms of whether their cases can be considered as "arising in the land and naval forces."

Present counsel has already confessed error on the same point. Covert Br. 78, note 58.

adduced had demonstrated that the asserted military jurisdiction could not be justified as an original proposition (Covert Br. 36-91).

In any event, it seems crystal clear that last June the military jurisdiction here asserted was rested on a basis other than that under which it was plainly exerted, for the reason that some or all of the arguments against that jurisdiction were, as a matter of law, too compelling to permit of any other course.

4. Since civilian dependents admittedly cannot be tried by court-martial in the United States although members of the armed forces can be, the present assertion of power must rest on the untenable proposition that a civilian dependent accompanying the armed forces overseas loses his or her civilian status.

If it be contended or assumed that civilian dependents accompanying the armed forces, living on military reservations within the United States and enjoying certain physical military amenities, constitute a part of the "land and naval Forces", either by virtue of Clause 14 or in consequence of Clause 14 as broadened and supplemented by Clause 18, then, plainly, wives and children, whose relationships to the military head of their household and to the military establishment at places within the United States are, in every significant aspect, identical with Mrs. Smith's relationship with and to the Army in Japan and with Mrs. Covert's relationship with and to the Air Force in England, must be equally subject to trial by court-martial: Being a part of the land and naval forces, they are impliedly excepted from the guarantee of jury trial.

We understand that the Government disclaims any such contention,[18] and certainly the military precedents do. See the rulings collected at Covert Br. 39-42.

[18] Except possibly as to the right to retry Mrs. Covert by court-martial within the District of Columbia, as to which see Covert Br. 21-36 and pp. 160-168 *infra*.

Since, plainly, members of the armed forces within the United States cannot claim the guarantee of jury trial when facing a court-martial, the question within the United States is one of status (Winthrop, *145 [reprint, p. 906]), and is therefore, as was suggested at the original argument (Ward & Paul transcript, p. 47), "Who?" rather than "Where?"

If then, wives lose their immunity from trial by court martial once they are overseas, it must be on some basis other than the scope of "land and naval Forces" within the United States.

One basis would be that certain provisions of the Constitution are not operative abroad, that while certain clauses of that instrument are available for export, so that the President remains Commander-in-Chief of American forces overseas, and so that Congress can make punishable acts done abroad (e.g., *Jones v. United States*, 137 U.S. 202; *United States v. Bowman*, 260 U.S. 94; *Blackmer v. United States*, 284 U.S. 421; *Kawakita v. United States*, 343 U.S. 717), the guarantee of bail and the dual guarantee of jury trial somehow stop at the water's edge.

We point out below, pp. 68, 91-92, 95-96, the untenability of any such assumption.

The only other basis would be that "land and naval Forces" somehow has a greater content outside the United States. We propose to demonstrate that this argument is inherently absurd; that the overseas amenities enjoyed by civilian dependents, to the extent that they may vary from those available in the United States, cannot change a civilian into a soldier; that the present assertion of "practical necessities" is too recent to be convincing; and that the specific terms of the NATO treaties show that the United States has agreed to a treatment of civilian dependents different from that which it obtained for others.

First. The inherent absurdity of the present contention can be demonstrated by a few simple examples.

Let us suppose the case of a transport, carrying military personnel and their dependents to the Far East in connection with an Operation Gyroscope rotation of combat units between the United States and overseas.

On the assumption under consideration, the wives and children are not a part of the land forces when the ship is two miles beyond the Golden Gate—but when the transport is four miles out, or at any rate when it steams past the outer limit of the Continental Shelf, they are.

Another case: It has frequently happened in the past that military personnel accompanied by their civilian dependents are transported overseas by commercial rather than military transportation. If a dependent wife accompanying her military husband were to kill him on board a privately owned American ship, on which they were both travelling pursuant to military orders, and the homicide took place a thousand miles from the American coast, she would (in view of 18 U.S.C. § 7) have violated 18 U.S.C. § 1111, and would accordingly be triable—before a jury in the first United States judicial district into which she could be brought. 18 U.S.C. § 3238.

But, on the assumption now under consideration, if she committed the same homicide at the same place on a military transport she would be triable by court-martial, without a jury—because then, so the argument runs, she would be a part of the land and naval forces.

Second. It is earnestly argued, however (U.S. Supp. Br. 25-26), that "All civilians who accompany the armed forces overseas are so closely identified with those forces as to be indistinguishable from them for all practical purposes." But on analysis, such amenities as are made available to overseas dependents (U.S. Supp. Br. 26-27) fall into three classes, none of which can possibly affect their status.

The first are those furnished civilian dependents in this country—government transportation; medical, dental and

mortuary service, schools, clubs, theaters; special banks; housing; food, gasoline, and oil supplied by the Government; and the protection of military police. All of those are available to dependents of every military installation in this country.

The second are a group of facilities furnished by the United States to civilian dependents abroad but not to such dependents in this country: special passports, special postal service, special customs privileges. These are amenities regularly extended to members of Congress and to high executive officials, but they plainly have no such bearing on status that their receipt can subject a civilian to trial by court martial.

The third class comprises privileges extended by foreign governments: admission to the country without a visa, tax exemptions, border crossing privileges, free importation of automobiles. Just how acts of a foreign country can transform American civilians into members of the American land and naval forces is not explained.

The Government says (U.S. Supp. Br. 27), "Because they are so closely identified with the armed forces, the local populace in the various foreign areas look upon and identify these civilians only as members of the American military community. * * * To the local population civilians and military are indistinguishable. As a corollary, the local populace naturally and rightly expects the military commander to supervise and control this civilian contingent."

Plainly, as has been pointed out (*supra*, pp. 26-29), no treaty with a foreign country could deprive of the right to a jury trial an American civilian who but for such treaty would have had that right. How then can foreign public opinion do so? It is assuredly strange doctrine to suggest, as the Government very plainly does in the passage just quoted, that the resolution of the present question of American constitutional law is to be left to

the judgment of the man in the street of another country."

Third. Are "All civilians who accompany the armed forces overseas" really "so closely identified with those forces as to be indistinguishable from them for all practical purposes" (U.S. Supp. Br. 25-26)?

We had supposed that one of the most galling features of overseas service, particularly in isolated areas or in countries with non-temperate climates, was the obligation to remain there, under pain of trial for desertion in the event that the soldier still thought that he could avail himself of the civilian privilege to quit an undesirable occupation at will.

Plainly, civilian employees are not subject to trial as deserters if they simply quit, pack up, and go home; they are not even within the terms of Art. 85, UCMJ, which is strictly limited to "Any member of the armed forces."

Does the Government consider this to be an immaterial difference?[17]

Fourth. It is argued at considerable length (U.S. Supp. Br. 6, 72, 75-76) that the presence of American armed forces abroad is a new feature rendering imperative a constitutional New Look that will reject the boundary of jury trial which was confirmed by the Bill of Rights as a bit of outmoded Eighteenth Century thinking that has no place in the changed world of the Twentieth Century. Cf. U.S. Reid Br. 44, where it was said that "the world about which Colonel Winthrop wrote no longer exists."

But this argument comes rather late in the day; there is nothing so very new about United States forces overseas. Ever since 1903, the United States has had under

[17] For obvious reasons, we need not here consider whether a wife leaving her overseas husband to await his return to the United States would be guilty of "desertion" in terms of domestic relations law.

lease a large naval base at Guantanamo in Cuba. 1 Malloy, *Treaties, Conventions, etc.* [S. Doc. 357, 61st Cong., 2d sess.] 358, 360. But it never occurred to the Navy, as late as 1937, that the presence of its forces there, on foreign soil, rendered civilians on the Guantanamo base triable by military tribunals in time of peace; the ruling then was that there was no such jurisdiction. OMO 11 of 1937, p. 18. And there is no showing that the cited opinion evoked any complaint from the Commandant at Guantanamo similar to the naval views now presented (U.S. Supp. Br. 115-129), to the effect that lack of court martial jurisdiction over civilian employees somehow jeopardized the success of his mission.

Fifth. Finally, the most conclusive point undermining the Government's present attempt to lump soldiers, civilian employees, and civilian dependents together is the circumstance that, as we demonstrate in detail below, pp. 150-152, civilian dependents have less immunity from foreign law under the NATO Status of Forces Treaty than do the other two groups. We there show that, as the explicit terms of that Treaty establish, primary jurisdiction over all criminal offenses committed by civilian dependents is conceded to the receiving state. There is no such concession as to all offenses committed by the others.

In view of all these factors, particularly in view of the oversight of the treaty provisions, it must be plain that what the Government is attempting is to change status, and thus to obtain jurisdiction, by assertion alone. Its arguments accordingly recall the cynical comment attributed to Aaron Burr: "Law is anything that is boldly asserted and plausibly maintained."

B. The Now Abolished Consular Jurisdiction Does Not Support the Present Trials by Court-Martial.

The cornerstone of the Court's opinion last June was the decision in *In re Ross*, 140 U.S. 453, which sustained the

validity of a non-jury trial before an American consular court in Japan. But the consular court was an historical survival, that rested on bases wholly different, as a matter of both our own constitutional law and of generally accepted international law, from those underlying courts-martial. Consequently, for quite a number of reasons, the *Ross* case, properly viewed, is not and cannot be authority for justifying the trial of civilians by court-martial in time of peace.

1. The only possible basis for sustaining the non-jury aspect of the consular jurisdiction, long moribund and now abolished, would be that it predated the Constitution, and is thus impliedly excepted from the guarantee of jury trial.

The origins of extraterritorial jurisdiction exercised by foreign diplomatic and consular officials over their own nationals who reside in the countries to which those officials are accredited may lie, as some have contended, in the dim mists of antiquity. See Ravndal, *The Origin of the Capitulations and of the Consular Institution*, S. Doc. 34, 67th Cong., 1st sess. (1921). Even in comparatively recent years there were significant distinctions between the extraterritorial jurisdiction exercised in Turkey and the regions formerly under Ottoman suzerainty and that obtaining elsewhere. See 2 Moore, *Digest of International Law*, 596. But certainly the basis for Western powers' maintaining and obtaining capitulatory rights in non-Christian countries, throughout the Nineteenth and Twentieth Centuries, was force. Those rights were, in consequence, resented; it became an object of nationalist ardor to cause them to be terminated; and when, one by one, they were finally relinquished, the territorial sovereign considered such relinquishment to be—as in fact it was—an accolade of international recognition of national maturity.

At one time or another, the United States enjoyed and exercised capitulatory rights in Borneo, China, Egypt, Ethiopia, Iran (Persia), Japan, Korea, Libya (Tripoli),

Madagascar, Muscat (Zanzibar), Morocco, Samoa, Thailand (Siam), Tunis and Turkey. 2 Moore, *Digest*, 593, 613, 722-727; 1 Moore, *Extradition*, 100-105, n. 5; 2 Hackworth, *Digest of International Law*, 530, 532.

We can trace the gradual abandonment of American extraterritorial jurisdiction abroad through the authoritative pages of the State Department Digests edited by *Moore* and *Hackworth*.[18] In some instances, conquest of the territory in question by a non-capitulatory power ended our extraterritorial rights; this was the case in Madagascar (2 Moore 637-638), Tunis (2 Moore 638), Zanzibar (*id.*; 2 Hackworth 534), Libya-Tripoli (2 Hackworth 534), and Samoa—where half of the islands passed to the United States and the other half to Germany (2 Moore 593).

In Egypt, our consular courts were replaced in 1876 by a system of mixed courts (see Brinton, *The Mixed Courts of Egypt*), until finally, effective 1938, we relinquished capitulatory rights in Egypt (2 Hackworth 512-517, § 180), although Article 3 of the multilateral treaty in question provided that the mixed courts were to continue until October 1949. 53 Stat. 1645, 1653.

In other countries, one by one, we gave up our rights by treaty. Extraterritorial rights in Japan were terminated by treaty signed in 1894, effective 1899 (2 Moore, 659-661), and, when Korea was annexed by Japan in 1910, that ended our extraterritoriality there also (2 Hackworth 533-534). We did not recognize Turkey's unilateral abolition of capitulations in 1914, but willingly did so by treaty signed in 1931 and proclaimed in 1933 (2 Hackworth 527-529, § 182). Capitulatory rights in Iran were relinquished in 1928 (2 Hackworth 532).

In Thailand, long known as Siam, the termination of our extraterritoriality was gradual. In 1920, jurisdiction over

[18] In order to avoid a multiplicity of citations on what are essentially collateral matters, we do not refer specifically to any treaties or agreements except those subsequent to the latter compilation.

Americans was committed to the Siamese courts, subject however to a right of evocation, viz., the power to recall particular cases back to American consular courts. But that right was never exercised, and in 1937 all extraterritorial rights were unconditionally surrendered. 2 Hackworth 532-533.

American extraterritorial rights in China were not given up until the Treaty of 1943, 57 Stat. 767. Similar rights in Ethiopia were abandoned in fact in 1937 when it was overrun by Italy (2 Hackworth 530). After Ethiopian liberation and subsequent to World War II, such rights were formally relinquished by a treaty, signed in 1951 and ratified in 1953, upon receipt of an assurance that Ethiopian courts would conform to Western standards of justice. TIAS 2864, 4 U.S. Treaties 2134. But in Morocco, as late as 1952, the United States successfully maintained, before the International Court of Justice, its extraterritorial jurisdiction in that country, civil and criminal, in all cases between American citizens, and in all cases where American citizens or protectees were defendants. See International Court of Justice, *Reports of Judgments*, 1952, p. 176; Bishop, *Case Concerning Rights of Nationals of the United States of America in Morocco*, 47 Am. J. Int. L. 136; Sweeney, *Treaty Rights of the United States in Morocco*, 25 Dept. of State Bull. 620.

This, however, was the dying gasp of what Judge Hudson has accurately characterized as "a moribund historical jurisdiction." Hudson, *The Thirty-First Year of the World Court*, 47 Am. J. Int. L. 1, 15. Only in Morocco did there exist the last vestige of American consular jurisdiction, and last summer Congress provided for the repeal of all remaining statutory provisions dealing with diplomatic and consular jurisdiction "effective upon the date which the President determines to be appropriate for the relinquishment of such jurisdiction." Act of August 1, 1956, Pub. L. 856, 84th Cong., 70 Stat. 773; see S. Rep.

2274, 84th Cong., 2d sess. All American consular jurisdiction in Morocco was accordingly relinquished on October 6, 1956. 35 Dept. of State Bull. 844 (Nov. 26, 1956).

It is thus a paradox, not without irony, that in the very same year that the Congress and the President acting jointly have abolished the consular jurisdiction, essentially because it was unsuited to present day world conditions, this Court should have relied upon that same "moribund historical jurisdiction" to justify trials by court martial that it was not prepared to rest on the power to govern the armed forces.[19]

Consideration of the constitutional basis for the consular jurisdiction long ago evoked a diversity of opinion, see 11 Cong. Rec. 409-417 (1881), and the question then put by Senator Carpenter of Wisconsin (p. 413), "whether this Government can derive any power denied to it by the Constitution from a treaty with a foreign nation?", cannot be said to have been answered by Secretary Blaine's reply, S. Ex. Doc. 21, 47th Cong., 1st sess.

Secretary Frelinghuysen's rationalization of the constitutional basis for the consular jurisdiction, a little later, was as follows (Sen. Misc. Doc. 89, 47th Cong., 1st sess., p. 14):

[19] This seems an appropriate juncture to point out once and for all the error at 351 U.S. 477-478, where it is said that "It was conceded before this Court that Congress could have established, or might yet establish, a system of territorial or consular courts to try offenses committed by civilian dependents abroad."

No such concession appears at Covert Br. 84, where "the continued vitality" of *Ross* was suggested as an "intriguing question" that was deemed not actually presented for reasons there set forth.

At the oral argument, the suggestion was plainly conditional, see Ward & Paul transcript, pp. 58-59: "Well, there is a fine opportunity to test the continued validity of the *Ross* case. *And if the Ross case is still good law, as he believes,* I see no reason why it is not possible to provide for a consular jurisdiction to try these persons who are accompanying the army overseas." [Italics added.]

Plainly, there was no such concession as the Court's opinion indicates.

"The Constitution, by its terms, is ordained and established 'for the United States of America.' The place in which laws of this class are in force are out of the United States and form no part of our domain.

"The Constitution and the laws of the United States, made in pursuance of it and treaties made under its authority, are to be the supreme law of the land; but not of any other land, nor for American citizens living in any other land."

This view was followed by the Court in the *Ross* case (140 U.S. at 464), where it was said that "The Constitution can have no operation in another country."

But that ground is plainly untenable. For, as was later said in *Balzac* v. *Porto Rico*, 258 U.S. 298, 312, "The Constitution of the United States is in force * * * wherever and whenever the sovereign power of that government is exerted." And, three times since then, the Court has qualified the statement in *Ross* so that it now reads—with italics added—"Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory *unless in respect of our own citizens*." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318; *United States* v. *Belmont*, 301 U.S. 324, 332; *United States* v. *Pink*, 315 U.S. 203, 226.

Of course, the Constitution operates outside of the United States. Plainly the President does not cease to be Commander-in-Chief of our overseas forces once they pass the national boundaries. Nor do American statutes cease to operate abroad when Congress intends them to affect American citizens there. See Covert Br. 82-83, where the references are collected. Very clearly, therefore, *Ross* cannot be sustained on the basis of the reasons therein set forth.

Nor, we submit, can the consular jurisdiction be supported on the footing that the consul is actually functioning as a judicial officer of the country to which he is accredited.

See 351 U.S. at 484-485; 11 Cong. Rec. at 410. When an American citizen is deprived of his life or liberty by officers of the United States, individuals whose powers rest on an American commission, those officers are not agents of a foreign nation. McIntyre,[20] the keeper of the Penitentiary of the State of New York at Albany, where *Ross* was held, was the "keeper of the United States" (cf. 351 U.S. at 489-490), not the keeper of the Mikado. When the American Consul-General hanged in the consulate at Shanghai an American citizen convicted of murder in the consular court, he was executing a warrant signed by the American Minister (*Diplomatic Correspondence, 1864* [H. Ex. Doc. 1, 38th Cong., 2d sess.], Part III, pp. 409-419; S. Ex. Doc. 21, 47th Cong., 1st sess., p. 7), a warrant that recited the Act of Congress pursuant to which the Minister was acting (*Dip. Corresp., supra*, pp. 415-416). The Consul General was in consequence enforcing American law, not acting as Lord High Executioner to the Emperor of China. All these individuals were exercising an *American* jurisdiction. The contrary assumption would lead to the plainly untenable conclusion that the United States Circuit Court for the Eastern District of Pennsylvania, in which *Wilberger* was tried (3 Wash. C. C. 515; 5 Wheat. 76), was a Chinese tribunal, or that the successor tribunal whose jurisdiction was in question in *United States* v. *Flores*, 289 U.S. 137, the United States District Court for the same district, was exerting judicial power that appertained to the King of the Belgians.[21]

There may be, however, a tenable basis for sustaining the consular jurisdiction, viz., that it was pre-constitutional.

[20] At 35 L. Ed. 581, *In re Ross* is entitled *Ross* v. *McIntyre*.

[21] Only the Mixed Courts of Egypt could be said to be exercising Egyptian sovereignty—but they were not American consular courts. See 2 Moore 722-727, § 286; 2 Hackworth 512-517, § 180. See also Brinton, *The Mixed Courts of Egypt*: "• • • the Mixed Courts are national courts" (p. 18), "they are part of the judicial system of the Egyptian state" (p. xxiv), and they existed side by side with certain foreign consular courts (pp. 288-293).

Provision for consular courts first appears in Articles 20 and 21 of the Treaty of Peace and Friendship between the United States and His Imperial Majesty the Emperor of Morocco (8 Stat. 100, 103; for a more exact translation, see 2 *Treaties and other International Acts of the United States of America* (Miller ed.) 185, 222-223). That treaty was signed on behalf of Morocco in 1786, and by John Adams and Thomas Jefferson on behalf of the United States in January 1787. It was ratified by the Continental Congress on July 18, 1787 (32 J. Cont. Cong. 353, 363-364)—at a time when the Constitutional Convention was in session. 2 Farrand 37-49.

But the Constitution did not go into effect until March 4, 1789. *Owings* v. *Speed*, 5 Wheat. 420. It is therefore plain that the consular jurisdiction is a pre-constitutional jurisdiction, established under the Articles of Confederation, and that, prior to 1789, American citizens abroad in countries granting a general extraterritoriality to the United States did not have a right to trial by jury before an American consul. It might therefore be argued that a consular trial is impliedly excepted from the constitutional guarantees of jury trial, just as are trials by court-martial of military personnel (*Whelchel* v. *McDonald*, 340 U.S. 122, 126-127), trials of petty offenders by judges of inferior courts (*District of Columbia* v. *Clawans*, 300 U.S. 617), trials by the court alone of persons charged with contempt (*In re Debs*, 158 U.S. 564, 594-596), and trials by military tribunals of offenders against the laws of war (*Ex parte Quirin*, 317 U.S. 1, 38-41).

Those persons—soldiers, petty offenders, contemnors, war criminals, Americans in countries granting complete extraterritorial rights to the United States—may be said to be outside the constitutional guarantees of jury trial because when the Constitution was adopted their cases were not of the category triable by a common law jury. Only on this footing, we submit, is it possible to sustain the decision in *In re Ross*, 140 U.S. 453.

But even on the only basis on which it can be supported, the *Ross* case does not control here, for two additional reasons:

First, the very reason why Ross could properly be tried by a non-jury consular court is also the reason why Mrs. Smith and Mrs. Covert could not be properly tried by a court-martial: In 1789, persons in Ross's situation had no right to trial by jury, while those in the two women's situation did have such a right. *Supra*, pp. 36-54.

Second, whereas in *Ross* there was an Act of Congress specifically declaring criminal what Ross had done, in these cases, once inquiry into the Clause 14 power is put to one side, there is no such Act. *Intra*, pp. 102-106.

2. Unlike consular jurisdiction, which rested on express treaty provisions, extraterritorial jurisdiction over military personnel flows, so the United States long contended, from accepted doctrines of international law.

Extraterritorial jurisdiction exercised by one nation over all of its citizens present in the territory of another—the now abandoned consular jurisdiction was derived from express treaty provisions. 2 Hackworth 493, § 177. But extraterritorial jurisdiction exercised by one nation over its military personnel within the territory of another was based, so the United States long contended, on a rule of international law, viz., the doctrine that the territorial sovereign's consent to the entry of the foreign forces necessarily implied a consent to their immunity from the processes of any of the territorial-sovereign's courts.

The foundation of that doctrine, so far as the United States was concerned, was Chief Justice Marshall's opinion in *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 139-140:

> "3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

"In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."

The doctrine of the extraterritoriality of friendly foreign armed forces was again set forth by this Court in *Coleman* v. *Tennessee*, 97 U.S. 509, 515, and in *Dow* v. *Johnson*, 100 U.S. 158, 165. It was similarly recognized by the British Privy Council in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160, where Lord Atkin at p. 168 referred to Chief Justice Marshall's opinion in *The Schooner Exchange* as "a judgment which has illumined the jurisprudence of the world." None the less, the Privy Council's acceptance of the rule was a grudging one, and in the actual decision their lordships spelled out a waiver of the immunity from distinctly equivocal acts.

Other countries, too, recognized the doctrine. The Supreme Court of Justice of the Republic of Panama did so in 1925 in the case of *Republic of Panama* v. *Schwartzfiger*, 21 Am. J. Int. L. 182, 184, where it held that an American soldier on duty in the Canal Zone was not subject to Panamanian jurisdiction when he crossed over the Zone boundary into Panamanian territory:

"It is a principle of international law that the armed force of one state, when crossing the territory

of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign, but to that of the officers and superior authorities of its own command."

The principle of military extraterritoriality was recognized also by text writers of various nationalities. In the interest of brevity, it seems desirable simply to incorporate by reference the very complete citation of these authorities in Colonel Archibald King's now classic paper, *Jurisdiction over Friendly Foreign Armed Forces*, 36 Am. J. Int. L. 539, published in 1942, which concluded (p. 567) that "the general principle is abundantly established by reason, authority, and precedent, that the personnel of the armed forces of Nation A, in Nation B by the latter's invitation or consent, are subject to the exclusive jurisdiction of their own courts-martial and exempt from that of the courts of B unless such exemption be waived. That principle has already been expressly recognized by several of the United Nations."

That article purported to be, with due regard for the proprieties, an expression of individual views, but in fact, in view of "the important role played by its author in negotiating during the war a series of agreements securing special immunities for visiting American troops abroad" (Brinton, *The Egyptian Mixed Courts and Foreign Armed Forces*, 40 Am. J. Int. L. at 737), it represented the position of the United States throughout World War II.

It was on the basis of the doctrine of complete military extraterritoriality that the United States obtained from the British the United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. VI, c. 31 (U. S. Reid Br. 74-84), as well as similar agreements and/or concessions from other nations.

It is true that Mr. Anthony Eden (as he then was) made reference to "the very considerable departure which the

above arrangements will involve from the traditional system and practice of the United Kingdom" (U. S. Reid Br. 79), and that in the parliamentary debates reference was made to the bill as a "striking innovation" and as being "of a completely revolutionary character." King, *supra*, at 558; and see Goodhart, *The Legal Aspect of the American Forces in Great Britain*, 28 A.B.A.J. 762. But all of the foregoing statements require qualification.

In the first World War, the British extended to American troops a similar immunity in fact, but never in law; protracted negotiations on the subject in 1917-1918 did not result in any formal agreement. King, *supra*, 551-553. Thereafter, and throughout World War II, the arrangements under which other foreign forces in Britain operated did not give those other forces immunity from local law. See Visiting Forces (British Commonwealth) Act, 1933 (23 Geo. V, c. 6); Allied Forces Act, 1940 (3 & 4 Geo. VI, c. 51); Schwelb, *The Status of Soviet Forces in British Law*, 39 Am. J. Int. L. 330. A number of Canadian soldiers, for instance, were tried, convicted, and hanged after trials for murder in British courts. Stacey, *Six Years of War* (Vol. 1 of the Official History of the Canadian Army in the Second World War) 426, note.

To that extent, it is true, the complete immunity enjoyed by American troops in Britain during World War II and until 1954 (Covert Br. 98, note 67) did represent a "very considerable departure." But the British had always obtained from other nations—from France in World War I, and from Egypt and Iraq thereafter—the same immunity from local jurisdiction that they accorded American forces from 1942 to 1954. See King, 36 Am. J. Int. L. at 533; King, *Further Developments Concerning Jurisdiction over Friendly Foreign Armed Forces*, 40 Am. J. Int. L. at 257. And while in fact that difference reflected the normal consequences of a stronger power dealing with a weaker one, complete immunity had the support, not only of the British

writers on international law (King, 36 Am. J. Int. L. at 544-546; King, 40 Am. J. Int. L. at 264), but also of the judgment of the Privy Council in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160. The "departure" thus came actually only to this, that Britain felt constrained to concede to the United States what it had denied to others at home but had always obtained for itself abroad.

The difference between capitulations and consular jurisdiction on the one hand, and military extraterritoriality on the other, is strikingly underscored by the relations between the United States and China during World War II. Effective May 20, 1943, we gave up, by treaty (57 Stat. 767), the extraterritoriality we had enjoyed there for nearly a century, since 1844. But as of the very next day, an executive agreement recognized the complete extraterritoriality of our armed forces in China with respect to criminal offenses. 57 Stat. 1248. The Chinese Ministry of Foreign Affairs said, in connection with the latter arrangement, (9 Dept. of State Bull. 114):

> "According to international law and international practice, when the armed forces of the Allied Nations are stationed in the territory of another for the purpose of undertaking joint military operations, exclusive criminal jurisdiction over members of such forces is exercised by the military or naval courts or authorities of the country to which such forces belong."

In most other countries, the United States enjoyed complete military extraterritoriality without formal agreement. Thus, in Brazil, the Supreme Court of that nation recognized the immunity. King, 40 Am. J. Int. L. at 262-263. In certain other countries, military extraterritoriality was made the subject of executive agreement; see 58 Stat. 1129 (India); 58 Stat. 1215 (Belgian Congo); 57 Stat. 1197 (Egypt), and note that in the latter instance (57 Stat. at 1197), "It is understood that the wives and children of the members of the United States Forces do not benefit

hereby from any immunity from jurisdiction and will be amenable to the jurisdiction of Egyptian courts."[22]

In Canada, however, the Supreme Court of the Dominion refused by a vote of 3 to 2, in three separate opinions, to recognize the full scope of Chief Justice Marshall's doctrine. *Reference re Exemption of U. S. Forces from Canadian Criminal Law*, [1943] S.C.R. 483; [1943] 4 D. L. R. 11. In fact, the arrangement arrived at secured the same effect by Order in Council. King, 40 Am. J. Int. L. at 274-275. And at the leased Atlantic bases, under Art. IV of the Base Lease Agreement negotiated in 1940-41, American forces had as a matter of law only a qualified immunity. 55 Stat. 1560, 1562. Similarly, the American legislation for reciprocal court-martial privileges for allied armed forces in the United States (Service Courts of Friendly Foreign Forces Act, 1944 [58 Stat. 643; 22 U.S.C. §§ 701-706]) which had been promised in 1942 by Ambassador Winant (U. S. Reid Br. 80-81 (57), 84), did not confer on British or Canadian troops in the United States, to whom alone it was made applicable (Proclamation No. 2626, 9 Fed. Reg. 12403), the same immunity that American forces enjoyed in Britain. U. S. Reid Br. 54-55, n. 28.

None the less, Colonel King could summarize the World War II experience in these terms (40 Am. J. Int. L. at 278):

> "The foregoing survey of the history of the last three years as to jurisdiction over friendly foreign forces shows that when our troops have been on allied territory the United States has uniformly obtained exclusive criminal jurisdiction over them in its courts-martial. Great Britain has done the same as to her forces on friendly foreign soil. Some of our smaller

[22] The immunity of most other foreign forces in Egypt, the British alone excepted (King, 36 Am. J. Int. L. at 547, 553, and, 40 Am. J. Int. L. at 257), extended only to acts done in *service commandé* (i.e., in line of duty on official business). See Brinton, *Jurisdiction over Members of Allied Forces in Egypt*, 38 Am. J. Int. L. 375; Brinton, *The Egyptian Mixed Courts and Foreign Armed Forces*, 40 Am. J. Int. L. 737.

allies, whose governments and forces have been in exile, have not been so fortunate. Though their courts martial have been permitted to sit, some of the host countries have undertaken to limit the powers of those courts and have insisted on the concurrent jurisdiction of the local criminal courts over the visiting forces.

"The courts of several countries have considered the problem. They have all quoted or cited Chief Justice Marshall's opinion in the case of *The Exchange*, nearly always with agreement, and often with praise; but have shown considerable reluctance to apply Marshall's doctrine against their own country, and a disposition—perhaps unconscious—to find the particular case before the court not within the scope of that doctrine."

After the war, therefore, American doctrine had sufficiently hardened so that, in successive editions of the *Manual for Courts-Martial*, prescribed by Executive Order of the President, it was set forth in these terms (MCM, U.S. Army, 1949, ¶11, p. 11; MCM, U.S. Air Force, 1949, ¶11, p. 11; MCM, U.S. [all services], 1951, ¶12, pp. 16-17):

"Under international law, jurisdiction over members of the armed forces of the United States or other sovereign who commit offenses in the territory of a friendly foreign state in which the visiting armed force is by consent quartered or in passage remains in the visiting sovereign. This is an incident of sovereignty which may be waived by the visiting sovereign and it not a right of the individual concerned."

On the foregoing basis, it is plain that the provisions in the NATO Status of Forces Treaty, and the corresponding provisions of the Administrative Agreement with Japan, under which the sending state concedes to the receiving state primary criminal jurisdiction over offenses by members of the sending state's forces that do not involve official duties (Covert Br. 103), all rest on the principle of waiver.

But to have supported the NATO Status of Forces Treaty on the basis of a waiver might well have evoked a considerable opposition, in the light of the prevailing climate of opinion with reference to the scope of the treaty power. Accordingly, it was argued in support of the Treaty that there never was any rule of automatic immunity, and that even the qualified immunity obtained under the NATO Treaty amounted to a concession made to the United States by the other NATO countries. *Agreements Relating to the Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters*, Hearings before the Senate Committee on Foreign Relations, April 7 and 8, 1953, pp. 56, 66; *Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty*, Supplementary Hearing before the Senate Committee on Foreign Relations, June 24, 1953, pp. 38-56, 68, 72-77. Thus it was said, in a memorandum presented to the Committee at the latter hearing (p. 54) and later reprinted under the name of its actual author (Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 Col. L. Rev. 1091, 1111):

> "It has been claimed that under international law friendly foreign forces are immune from the criminal jurisdiction of the receiving state for crimes committed therein. This contention is without [substantial] foundation."*

To call that conclusion backtracking is to understate the case substantially. Actually, the position of the supporters of the treaty involved a thoroughgoing repudiation of Marshall, C. J., of the President's 1949 and 1951 *Manuals for Courts-Martial*, and of the position energetically and consistently put forward by the United States all during World War II—all to the point of stultification, and perhaps beyond. It does not require unusual prescience to predict that the position taken by the supporters of the

* The bracketed word appears in the Columbia Law Review article but is not in the memorandum that was presented to the Senate Committee.

NATO Treaty before the Senate Committee will long haunt every American effort to obtain even minimal immunity for American forces in any foreign country, however small or weak.

A more realistic approach was that of Professor Re, who concluded (*The NATO Status of Forces Agreement and International Law*, 50 N.W. L. Rev. 349, 392):

> "Sound legal analysis, therefore, would require the conclusion that although a certain immunity exists for foreign friendly visiting forces, the extent of the immunity is strictly a matter of agreement."

Certainly, "when we wash it with cynical acid" (Holmes, "The Path of the Law", in *Collected Legal Papers*, 167, 174), the immunity situation reduces itself to a question of who needed whom most. The British needed United States forces far more than they needed those of the Commonwealth, the Soviet, or the governments in exile, hence the former enjoyed a wider immunity (*supra*, pp. 74-75). All of the smaller allies needed United States forces sufficiently to recognize their complete immunity (*supra*, pp. 72, 75-76). On the other hand, the United States did not need the others nearly so much, and hence extended less to our allies that we got in return (*supra*, p. 76), though we considered our stake in NATO sufficiently high so that we were willing to take less under the NATO Status of Forces Agreement—or were prepared to waive rights for which we had theretofore consistently contended—in order to complete the NATO arrangements.

Consequently, while in this field, also, "There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both" (*United States* v. *Flores*, 289 U.S. 137, 158), it is plain that military extraterritoriality depends on some form of consent, at the very least on the consent to the entry of the foreign

forces. The disagreements outlined above do not extend to that proposition, but go simply to whether the immunity flows automatically from the consent to entry of the troops, whether it flows from a specific agreement to concede immunity, or whether there is some middle ground.

On any basis—and this is the point material here—on any basis, military extraterritoriality, in whatever form exercised, involves a consent by the territorial sovereign to the exercise of jurisdiction by the personal sovereign, and does not in any sense involve, as the Court last June mistakenly assumed (351 U.S. at 473-474, 479), a cession of jurisdiction by the territorial sovereign to the personal sovereign.

And, although in the consular court situation there have been suggestions, however erroneous, that the foreign consul is *pro tanto* a judicial officer of the country in whose territory he exercises jurisdiction (*supra*, pp. 68-69), no such suggestion has ever been made in the military situation. Nor could it be; after all, the prosecution in the *Covert* case was, not *Regina* v. *Covert*, but *United States* v. *Covert* (R. 12, 62, 97; No. 701), and that in the *Krueger* case similarly *United States* v. *Dorothy Krueger Smith* (R. 23, 47, 52; No. 713), and not *Emperor* or *Empire of Japan* v. *Smith*.

Consequently, for these reasons also, assuming for purposes of argument that the consular jurisdiction is still valid, it would not and could not justify or sustain the military jurisdiction that is in issue in the present cases.

C. The Courts-Martial Here Involved Cannot be Sustained as Legislative Courts.

The rationale of the Court's opinion last June is that the courts-martial here involved can be constitutionally justified as legislative courts. Such a characterization disregards history, wholly overlooks the essential functional difference between courts-martial and true legislative

courts, and, far from reaching the question of Congressional power, actually obscures it with a label, since the circumstance that a particular court is properly described as legislative does not necessarily dispense with the requirement of a jury in criminal cases or with other Bill of Right protections.

1. Prior to June 1956, a court-martial was never considered to be a legislative court.

It can easily be demonstrated that, prior to June 11, 1956, when the Court's opinions in the present cases were announced, no one—"no one but no one," as the huckster has it—ever for one moment considered a court-martial to be a legislative court.

Congress certainly did not. Throughout its lengthy consideration of the Uniform Code of Military Justice, for a period of well over a year, there is not only no suggestion that Congress or any of its Committees or members were choosing between types of legislative tribunals, but every item of the legislative history establishes that it was not. That history establishes beyond effective contradiction that Congress considered itself to be proceeding under its power to govern the armed forces; that it accordingly acted through its Committees on Armed Services; that the Senate voted down a proposal to refer the Code to another committee; and that in enacting Art. 2(11), UCMJ, the sponsors of the bill—along with its departmental drafters—announced that they were simply carrying forward AW 2(d) as it had stood since 1916. Voluminous references are collected in Covert Br. 64, n. 50, and 93-95; Pet. Reh. 4-6; and pp. 21-26, 54-57, *supra*, which will not be again set forth. Nowhere, at no time, was there any mention of courts other than courts-martial; nowhere, at no time, was there even the faintest whisper of any suggestion concerning consular courts; and no one, nowhere, at any time, cited the *Ross* case in any connection.

The foregoing omissions will hardly occasion surprise among any persons familiar either with the nature of a court-martial or with this Court's decisions on the subject of legislative courts.

The traditional view regarded the court-martial, not as a species of legislative court, but as "a purely executive agency designed for military uses," which is "called into existence by a military order," such order being "a direction to certain officers named to assemble at a certain time and place and form a court for the trial of a person or persons specifically or in general terms indicated • • •" Winthrop, *54-55, *229 (reprint, pp. 49-50, 158). "Courts-martial are creatures of orders; the power to convene them being an attribute of command. • • • the convening of a court-martial is simply the giving of an order to certain officers to assemble as a court, and, when so assembled, to exercise certain powers conferred upon them by the Articles of War." *Runkle* v. *United States*, 19 C. Cls. 396, 409, reversed on other grounds, 122 U.S. 543. Even today, see MCM, 1951, ¶36*b*, "A court-martial is created by an appointing order issued by the convening authority." We point out below, pp. 83-86, how the functional differences between courts-martial and genuine legislative courts transcend considerations of mere nomenclature.

Moreover, in the exhaustive listing of courts then deemed legislative that appears in *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, there is no reference to courts-martial as being properly included in that category. Similarly, there is no reference to courts-martial in the briefs in that case (No. 17 Orig., Oct. T. 1928), nor in the opinions and briefs in the later cases dealing with legislative courts, *O'Donoghue* v. *United States*, 289 U.S. 516; *Williams* v. *United States*, 289 U.S. 553 (Nos. 728-730, Oct. T. 1932).

True, the Court in *O'Donoghue* disapproved the *Bakelite* dictum (279 U.S. at 450) that the courts of the District of Columbia were legislative tribunals, and held them to be

constitutional courts. The further *Bakelite* dictum (279 U.S. at 452-455) that the Court of Claims was a legislative court was reaffirmed in *Williams*. But about a decade later, the Government itself argued that *Williams* was wrong (Brief for the U.S. in *Pope* v. *United States*, 323 U.S. 1 [No. 26, Oct. T. 1944]), and in 1953 Congress expressly declared the Court of Claims to be a constitutional court created under Article III. Section 1 of the Act of July 28, 1953, c. 253, 67 Stat. 226, amending 28 U.S.C. § 171.

It may well be, therefore, that the *Bakelite* case today is valid only within a limited sphere. But until June 1956 it never occurred to anyone that the Court's *Bakelite* opinion was also deficient in not including courts-martial in its enumeration of what were then considered to be legislative tribunals.

2. A court-martial is an executive rather than a legislative court since its judgments are inchoate until reviewed and acted upon by an executive officer.

The reasons why a court-martial is an executive tribunal are essentially functional.

First. A court-martial is an *ad hoc* tribunal created by a military order (*supra*, p. 82; see R. 22 in No. 713), whereas every legislative court of which we are aware is a body of more or less permanence that is established by Act of Congress.

Second. It is perfectly possible for the judgment of a legislative court to be within the appellate jurisdiction of the Court. E.g., *De Groot* v. *United States*, 5 Wall. 419 (Court of Claims); *United States* v. *Coe*, 155 U.S. 76 (Court of Private Land Claims). It is only when the matter dealt with by what is assumed to be a legislative court does not present a "Case" or "Controversy" (*Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693), or when the judgment of the legislative court is subject to revision by

Congress (*In re Sanborn*, 148 U.S. 222) or by an executive officer (*Gordon* v. *United States*, 2 Wall. 561, 117 U.S. 697) that this Court is without appellate jurisdiction.

But while, as the history of the Court of Claims shows (cf. *Gordon* v. *United States* with *De Groot* v. *United States*, both *supra*), there is no essential reason why the judgment of a legislative court cannot be invested with such finality as to be reviewable here, the very nature of a court-martial precludes any such possibility.

The judgment of a court-martial is inchoate until it has been approved by the final reviewing authority. To quote Winthrop, *683 (reprint, p. 447):

> "While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him."

Thus, where such officer has not been shown to have acted, the proceedings of the court-martial remain a nullity. *Runkle* v. *United States*, 122 U.S. 543. Before approval, the sentence is "interlocutory and inchoate only." *Id.* at 555.[23]

Even today, every proceeding of every court-martial must be laid before the officer appointing the court for his personal action. Arts. 60, 64, UCMJ (10 U.S.C. §§ 860,

[23] Later cases, which professed to find indicia of personal action by the reviewing authority in situations factually very similar to that presented in *Runkle* (*United States* v. *Page*, 137 U.S. 673; *United States* v *Fletcher*, 148 U.S. 84; *Ide* v. *United States*, 150 U.S. 517) do not purport in any degree to vary the principle of *Runkle* that such action is necessary to make the sentence operative.

864);[24] MCM, 1951, ¶¶ 84-91. And notwithstanding the full panoply of appellate review provided by the UCMJ, in death, dismissal, and general and flag officer cases, where Presidential or Secretarial action is required by Arts. 71(a) and 71(b); 10 U.S.C. §871, it is the act of the officers, not the decision of the Court of Military Appeals, which is necessary before those sentences can be carried into execution. That this further requirement is not a simple matter of executive clemency is demonstrated by current General Court-Martial Orders.

A death sentence, which must be automatically reviewed by the Court of Military Appeals pursuant to Art. 67(b)(1), 10 U.S.C. § 867(b)(1), must still be ordered executed by the President. E.g., GCMOs 67 and 68, D A, 1954; *id.*, Nos. 64-66 of 1953; *id.*, Nos. 58-59 of 1952. Contrariwise, even after the Court of Military Appeals has denied a petition for grant of review, so that the judicial appellate process is completed, the Secretary or his designee can still disapprove the sentence and dismiss the charges. E.g., GCMO 24, D A, 1956. Such action is wholly distinct from powers of clemency, the exercise of which is indicated in the note.[25]

Moreover, as *Wade* v. *Hunter*, 336 U.S. 684, shows, the military officers appointing a court-martial may withdraw a case from the court-martial, and terminate the tribunal's power to proceed without thereby placing the accused in

[24] We cite the new U. S. Code references from Chapter 47 of the Act of August 10, 1956, c. 1041, 70A Stat. 1, 36, which by virtue of §51 of that Act (70A Stat. 640) took effect on January 1, 1957.

[25] Commutation of death sentences by the President: E.g., Nos. 1 and 27 of 1956. Administrative discharge substituted for dismissal pursuant to Art. 74(b), UCMJ: E.g., No. 28 of 1956; Nos. 24 and 47 of 1955; Nos. 25, 26, 27, and 90 of 1954. Portion of sentence remitted: E.g., Nos. 11 and 29 of 1956. All citations are to Department of the Army General Court-Martial Orders, which recite in each instance the appellate steps taken, election not to seek review, petition for review denied, or affirmance or reversal by the Court of Military Appeals, as the case may be.

jeopardy. Cf. Art. 44(c), UCMJ; 10 U.S.C. § 844(c). No comparable power is lodged in any officer with respect to cases under consideration by legislative courts.

This Court has refused to review judgments of military tribunals on direct review on the ground that they were not Article III courts. *Ex parte Vallandigham*, 1 Wall. 243; *In re Vidal*, 179 U.S. 126. But, as we have seen, it has reviewed the judgments of numerous kinds of legislative courts (*supra*, pp. 83-84), and it has similarly reviewed civil causes that originated in military government courts and that were later legislatively transferred to civilian courts, both constitutional and legislative. *The Grapeshot*, 9 Wall. 129; *Santiago v. Nogueras*, 214 U.S. 260. Similarly, there has never been any difficulty in reviewing the judgments of the Tax Court of the United States, which is "an independent agency in the Executive Branch of the Government" (26 U.S.C. § 7441), or of its predecessor, the Board of Tax Appeals. See *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716.

It follows, we think, that the true basis for this Court's inability to review the judgments of military tribunals directly is that they are executive tribunals in the functional sense that all of their proceedings must be reviewed by an executive officer as a prerequisite to the validity of their findings and sentences.

The result is that, by their very nature, courts-martial never were, are not now, and cannot ever be, legislative courts.

3. To speak of courts-martial as legislative courts does not settle the question of Congressional power but simply obscures it.

Even if it be assumed for purposes of argument that a court-martial is still somehow a legislative court, such an assumption does not settle the present problem.

The basis of legislative, as distinguished from constitutional Article III courts, is that "other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution." *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. So, assuming that a particular power exists, Congress can, subject to applicable constitutional limitations, create a legislative court—and this brings the matter squarely back to the issue not faced in June.

If a court-martial is deemed to be a legislative court, there is no difficulty under the present assumption on the footing that such a tribunal is a legislative court created under the Clause 14 power to govern the armed forces. But if inquiry into the scope of that power is avoided, simply to call a court-martial a legislative court does not establish the power of such a tribunal to try civilians who manifestly are not a part of the land and naval forces.

Just as the legislative courts created for the territories "are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited," for the expressed reason that "They are incapable of receiving it." (*American Ins. Co. v. Canter*, 1 Pet. 511, 546, quoted in *Bakelite*, 279 U.S. at 450), so courts-martial are not legislative courts in which the power to try persons not members of the land and naval forces can be deposited. They are incapable of receiving it.

The short of the matter is that to talk of legislative courts in the present connection is to proceed in a most unprofitable circle.

4. The circumstance that a particular tribunal is a legislative rather than a constitutional court does not automatically dispense with the requirement of a jury trial in criminal cases.

The Court last June said (351 U.S. at 479), "We find no constitutional defect in the fact that the Code [of Military Justice] does not provide for indictment by grand

jury or trial by petit jury. In these respects it does not differ from the procedures specifically approved by this Court in other types of legislative courts established thereof by Congress. *In re Ross*, [140 U.S. 453]; *Hawaii v. Mankichi*, 190 U.S. 197; *Dorr v. United States*, 195 U.S. 138; *Balzac v. Porto Rico*, [258 U.S. 298]."

We submit that the foregoing is fundamentally erroneous because it fashions into a principle of general application two particularized exceptions that rest on bases wholly different from those underlying the courts-martial here involved.

First. The error of the assumption made last June can be initially demonstrated by examining some present-day territorial courts.

The District Court of Alaska is, for certain purposes (e.g., 28 U.S.C. § 460), a United States Court; the Federal Rules of Civil Procedure apply to proceedings therein (48 U.S.C. § 1063a); and it has the jurisdiction of district courts of the United States (48 U.S.C. § 101). But the judges of that court are appointed, not during good behavior, but for only four year terms (48 U.S.C. § 112), and they are removable by the President (*id.*; *McAllister v. United States*, 141 U.S. 174). It seems clear, also, that their compensation may be diminished during their continuation in office. See *United States v. Fisher*, 109 U.S. 143; cf. *Williams v. United States*, 289 U.S. 553. And they have functions that are administrative rather than judicial. *Application of L. B. & W. 4217*, 238 F. 2d 163 (C.A. 9).

Plainly, then, the District Court of Alaska is a legislative court in the classic pattern of territorial courts. *American Ins. Co. v. Canter*, 1 Pet. 511; *Benner v. Porter*, 9 How. 235. But it does not follow, as the Court assumed last June, that this circumstance means that criminal causes therein can be tried before anything other than a common law jury. The decision in *Rassmussen v. United States*, 197 U.S. 516, which held invalid a criminal trial in Alaska

before a jury composed of only six jurors, establishes the precise contrary. And therefore it plainly follows that so much of Art. 2(11), UCMJ, as purports to subject to military law civilians accompanying the armed forces in that portion of Alaska that is west of longitude 172 degrees west is unconstitutional on its face.[26]

Similarly, in other territorial courts, which plainly were legislative rather than constitutional, it was uniformly held that a criminal defendant was entitled to a jury trial by a common law jury. E.g., *Reynolds v. United States*, 98 U.S. 145, and see cases cited in *Balzac v. Porto Rico*, 258 U.S. at 304.

Otherwise stated, it does not follow from the circumstance that the judge of a territorial court cannot invoke Article III to prevent his removal from office, or to claim tenure for life, or to protect his salary against reduction, because he presides over a legislative rather than a constitutional court, that the defendant haled before him in a criminal case is unable successfully to assert his right to trial by a common law jury. Yet this is precisely the conclusion that was drawn in the Court's opinion last June.

Second. As we have shown (*supra*, pp. 69-70), the consular court involved in *Ross* had an ancestry more ancient than either the original Constitution or the Bill of Rights. Diplomatic agents functioning under the government established by the Articles of Confederation had agreed, in 1786-87, to the trial of American citizens before an American consul in Morocco. Since such citizens abroad

[26] Whether the objection to Arts. 2(11) and 2(12) of the Uniform Code as originally enacted, that it subjected civilians on Guam to court-martial (96 Cong. Rec. 1435), was well taken, is a question that has become moot, not so much perhaps because of the decisions that held Guamanians entitled to all constitutional guarantees (*infra*, p. 96), but because Congress has since amended Arts. 2(11) and 2(12) so as to exclude Guam therefrom. Sec. 23 of the Act of Aug. 1, 1956, Public Law 896, 84th Cong., 70 Stat. 908, 911.

in countries that granted the United States capitulatory rights had therefore no right in 1789-1791 to trial by a common law jury, it could therefore be argued that the dual constitutional guaranty of jury trial in Art. III, Sec. 2, and in the Sixth Amendment, which preserved only the *status quo*, did not confer what had previously not existed. It could therefore be contended that the American tried by a consul in non-Christian lands could not found a successful claim to a jury trial on the Constitution (*In re Ross*), any more than a soldier in uniform could when tried by a court-martial (*Whelchel* v. *McDonald*, 340 U.S. 122, 126-127), or than a petty offender (*District of Columbia* v. *Clawans*, 300 U.S. 617) or a contemnor (*In re Debs*, 158 U.S. 564, 594-596) could when tried by a court without a jury, or than a spy or war offender could when haled before a military commission (*Ex parte Quirin*, 317 U.S. 1, 38-41). All such individuals subject to non-jury trials when the Constitution was adopted were impliedly excepted from the Sixth Amendment's guarantees.

Here, however, just the opposite situation obtains: Civilian wives were not triable by court-martial in time of peace in 1789 or in 1791 or before, so that they fall squarely within the guarantee.

Third. We turn now to the three Insular cases—*Mankichi*, *Dorr*, *Balzac*—that were cited by the Court last June (351 U.S. at 479).

1. While of course a territory or possession exerts the sovereignty of the United States, so that a federal trial following a territorial trial for the same offense involves double jeopardy (*Grafton* v. *United States*, 206 U.S. 333) whereas a federal trial following a state trial does not (*United States* v. *Lanza*, 260 U.S. 377), it is still demonstrably wrong to say (351 U.S. at 479) that the three Insular cases in question involved "types of legislative courts established abroad by Congress." For, in each instance, the non-jury trial was had in a local tribunal that

had been established and was in existence long before the territory or possession in question passed under American sovereignty.

a. Thus, Mankichi was charged by information dated May 4, 1899 (R. 1-2, No. 219, Oct. T. 1902) and was convicted by the verdict of 9 out of 12 jurors on May 18, 1899 in the Circuit Court of the First Circuit of Hawaii (R. 7). This was almost a year before the Hawaiian Organic Act of April 30, 1900, c. 339, 31 Stat. 141, and in a tribunal that had existed as early as 1859. See Civil Code of Hawaii, 1859, c. XIV (Of the Circuit Courts); Hawaii Compiled Laws, 1884, c. XIV (*id.*); Laws of Hawaii, 1892, c. 57, §§ 29-30; Ballou's Civil Laws of Hawaii (1897) §§ 1135-1137.[37] Indeed, the Organic Act simply recognized the existence of the circuit courts and did not purport to re-establish them. See 81, 31 Stat. at 157, now 48 U.S.C. § 631; cf. *Caplet* v. *Goar*, 197 U.S. 348.

b. Similarly, Dorr was tried in the Court of First Instance of the City of Manila (R. 1, No. 583, Oct. T. 1903), again a tribunal whose existence and jurisdiction were recognized rather than established by the first Congressional enactment that created a civil government for the Philippines. See 9 of the Act of July 1, 1902, c. 1369, 32 Stat. 691, 695.

c. Balzac was likewise tried in an insular court, the District Court of Arecibo, Puerto Rico (R. 1, No. 178, Oct. T. 1921; R. 1, No. 179, Oct. T. 1921). In this instance, also, the first Puerto Rican Organic Act simply recognized the courts of Puerto Rico that were "already established and now in operation." See 33 of the Act of April 12, 1900, c. 191, 31 Stat. 77, 84.

2. And the true basis for sustaining the non-jury trials in the three cases was, not that the Constitution is not in

[37] The development and growth of the Hawaiian legal system is considered in U. S. Br. 47-54, Point II C 2, in No. 429, Oct. T. 1946 (*United States* v. *Fullard-Leo*, 331 U.S. 256).

force overseas, to the contrary, "The Constitution is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted" (*Balzac v. Porto Rico*, 258 U.S. at 312)—not that juries can automatically be dispensed with once the three mile limit is passed or simply because the tribunal before which the accused is haled can be said to be a legislative court, but because neither the grand jury nor a common law petit jury had formed a part of the new possession's ancient institutions.

a. Thus, in Hawaii, prosecutions by the Attorney General rather than by grand jury indictment had been the practice since 1847, while verdicts by non-unanimous juries dated from 1842. See *Republic of Hawaii v. Edwards*, 11 Haw. 571, 579-580, a case decided after annexation, in November 1898. While the habeas corpus proceeding that was before this Court on appeal was initiated subsequent to the date of the Organic Act (*In the Matter of Mankichi*, 1 U. S. Dist. Ct. Haw. 303), Mankichi's prosecution in the Circuit Court preceded that enactment (*supra*, p. 91), and therefore, as the Solicitor General argued (Points Made in Oral Argument, No. 219, Oct. T. 1902, p. 7), "It is not to be presumed that it was intended to tear down the old house before it was even known a new one would be needed."

And this Court sustained the proceedings on that footing, viz., that the Constitution did not require the automatic uprooting of institutions native to Hawaii:

> "Until then [the Republic of Hawaii] was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and

was adopting a new procedure for which it had had no opportunity of making preparation.

* * * * * * *

"We * * * say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands; and well calculated to conserve the rights of their citizens to their lives, their property, and their well being." *Hawaii* v. *Mankichi*, 190 U.S. 197, 216, 217-218.

b. Similarly, it was held, with respect to the Philippines and Puerto Rico, that the Constitution did not force into the straightjacket of the common law system and tradition of jury trial Spanish-speaking lands that the United States had acquired by conquest.

"* * * if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition." *Dorr* v. *United States*, 195 U.S. 138, 148.

"Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete juridical system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when. * * *

the United States has been liberal in granting to the islands acquired by the Treaty of Paris, most of the American constitutional guaranties, but has been sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it." *Balzac* v. *Porto Rico*, 258 U.S. 298, 310, 311.

There was every reason to hold that the Constitution did not, *ex proprio vigore* and without Congressional action, disturb a system of law long established in Hawaii, and that grand juries and unanimous verdicts of petty juries, which were indeed instituted by § 83 of the Organic Act, now 48 U.S.C. § 635, were not necessary in courts existing prior to annexation before Congress acted. There was similarly every reason to hold that the common law jury system should not be deemed automatically imposed on the Philippines, an archipelago peopled by many tribes but little removed from savagery. "The jury system needs citizens trained to the exercise of the responsibilities of jurors. * * * [It] postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire." *Balzac* v. *Porto Rico*, 258 U.S. at 310. Could it be assumed that mere transfer of sovereignty from Spain to the United States readied the Moro to put away his bolo, or the Igorot warrior his spear, and to become judges of fact in criminal cases under instructions from a Filipino jurist as to the law, including a full exposition of the presumption of innocence and of the doctrine of reasonable doubt, all duly translated into the appropriate local dialect?

Here, however, we are dealing with American women, raised in the American tradition, who have never lost their civilian status. Can it be said for a moment that their marriage to servicemen, and travel with their husbands to the foreign soil to which the latter were ordered by competent military authority, so far removed them from their heritage that they can now be properly

assimilated to Hawaiians, Filipinos, and Puerto Ricans, to whom the common law jury was wholly foreign?

In the present cases, however, the Government is contending that a court martial can constitutionally be invested with power to try a class of American civilians who, at the time of the adoption of the Constitution, were triable only by a jury. At this juncture it is sufficient to say that this contention is not and cannot be supported by the rationale of *Mankichi*, *Dorr*, or *Balzac* nor by anything in the concept of legislative courts generally. Nothing in any of those cases, we submit, justifies depriving civilian wives of servicemen, women who on the basis of the Court's assumptions are not being dealt with as part of the land and naval forces, of the twice guaranteed constitutional right to a trial by jury.

5. The doctrine of legislative courts does not justify depriving American civilians of the right to bail, which is a necessary consequence of subjecting them to military jurisdiction.

Notwithstanding the Eighth Amendment, there is no such thing as bail at military law. "Bail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case." Dig. Op. JAG, 1912, p. 481, ¶ 10. "Bail" is in consequence not even indexed in Winthrop.

Yet the guarantee of bail has been deemed so fundamental that it was specifically included in the organic laws that were prescribed for those Spanish-speaking possessions to which the guarantee of jury trial was not extended. Section 5 of the Act of July 1, 1902, c. 1369, 32 Stat. 691, 692, 693 (Philippines); Sec. 3 of the Act of August 29, 1916, c. 416, 39 Stat. 545, 546 (same); Sec. 2 of the Act of March 2, 1917, c. 145, 39 Stat. 951, 951-952 (Porto Rico). And the Constitution of the Commonwealth of Puerto Rico that Congress approved in 1952 (Jt. Res. of July 3, 1952, c. 567, 66 Stat. 327) has a very broad bail guarantee in its Bill of Rights, Art. II, § 11.

Last June the Court relied on the non jury cases from the Philippines and Puerto Rico to justify the trial of these women by court-martial without a jury (351 U.S. at 475, 479). But those cases obviously did not and could not justify the denial in the possessions named of the protection against double jeopardy (*Kepner* v. *United States*, 195 U.S. 100; *Grafton* v. *United States*, 206 U.S. 333; *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 264-266), or of that against cruel and unusual punishments (*Weems* v. *United States*, 217 U.S. 349). Similarly, as has been shown, while jury trial was not guaranteed or even provided for, bail was, from which it necessarily follows, we think, that bail could not have been denied to persons accused of crime in the Philippines or in Puerto Rico.

We have already cited (Covert Br. 82-83) a number of cases that held constitutional guarantees operative in unincorporated territories. To those should be added the decisions that held applicable in Guam the grand jury requirements of the Fifth Amendment. *Pugh* v. *United States*, 212 F. 2d 761 (C.A. 9); *Hatchett* v. *Government of Guam*, 212 F. 2d 767 (C.A. 9), appeal dismissed by stipulation, 348 U.S. 801; *Putty* v. *United States*, 220 F. 2d 473 (C.A. 9), certiorari denied, 350 U.S. 821; *Pennington* v. *Government of Guam*, 228 F. 2d 892 (C.A. 9). Those cases certainly establish the scope of the personal rights guaranteed by the Constitution.

Similarly, the regulations under which the former consular courts operated in China, Japan, and the former Ottoman Empire included provisions for bail before trial and even pending appeal. See *Judicial Extraterritorial Rights*, Sen. Misc. Doc. 89, 47th Cong., 1st sess., pp. 73-74 (§§ 64-70), 97-98 (Forms 65-67), 108 (§§ 68-74), 127-128 (Forms 54-56), 177 (§§ 15-18). Even the *Ross* case, therefore, does not sustain the application to a civilian of the military law to which bail is unknown.

How then can the denial of bail to the civilians who fall within the terms of Art. 2(11), UCMJ, be justified? None of the authorities cited by the Court last June reach that problem. And we submit that no decision of this Court can be found to sustain such an obvious deprivation of a constitutional right heretofore thought available to all civilians.

Indeed, it is both fair and accurate to say that the absence of any provision for bail in the military system emphasizes in striking fashion the utter constitutional impropriety of permitting that system to exercise any jurisdiction over civilians in time of peace.

D. No Other Power or Combination of Powers Conferred by the Constitution Supports the Asserted Jurisdiction.

In the preceding subdivisions of the present Point II, we have shown that constitutional power to try civilian women by court-martial can be found neither in the power to govern the armed forces, with or without the Necessary and Proper Clause; nor in the now abolished consular jurisdiction; nor in whatever consequences may flow from the process of creating legislative courts. Under the present subdivision we lump, by way of catch-all, such other powers conferred by the Constitution to which reference has been or may be made.

1. The war power is both irrelevant and unavailing in the present cases.

We have already pointed out (Covert Br. 69-76) that while the war power sustains the right to try civilians by military tribunals in occupied territory, it is irrelevant to the present trials, which did not take place in areas under American military occupation. We have further pointed out (Krueger Br. 12-16) that Mrs. Smith's trial did not occur "in the field" within the meaning of Art. 2(10), UCMJ.

Those discussions, we would have thought, would have rendered unnecessary any further consideration of the war power. But the direction of the Government's contentions at the last Term, which read into the traditional "in the field" jurisdiction an exercise of the war power, suggest that a few clarifying words will not be found unhelpful.

A. The Government relied (U.S. Reid Br. 8, 10, 28, 40, 45, 46; U.S. Reply Br. 25; Ward & Paul transcript, pp. 28, 29) on a dictum in *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313, where this Court said, "Our question *does not* involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces," etc. We have ourselves added the italics; the present occasion must surely be unique in that a case is not only cited but strongly relied on to support the very proposition which was therein stated to be not under consideration.

B. The cases cited in the *Duncan* footnote were *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.); *Ex parte Falls*, 251 Fed. 415 (D.N.J.); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); and *Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645. These, as we have shown (Covert Br. 48-49), were war time camp-follower cases; each person was functionally, and therefore "directly" connected with the forces; none was a civilian wife, not so connected (Covert Br. 60-69).

C. The circumstance that the cited cases arose in war time did not, as Government counsel erroneously assumed (U.S. Reply Br. 25; Ward & Paul, p. 29), indicate that they represented an exercise of the war power. Rather, they reflected the circumstance that, at and before the adoption of the Constitution, the concept of "land and naval Forces" was deemed to be broader in time of actual hostilities within the actual theater of operations. Covert Br. 42-52.

D. Government counsel was similarly inaccurate in suggesting (Ward & Paul, p. 29) that the soundness of the cases in the *Duncan* footnote had been conceded. We had thought that our discussions, written (Krueger Br. 12-16) and oral (Ward & Paul, p. 42) alike, indicated precisely the contrary. But to allay any possible doubts we say here that, in our view, the *Jochen* and *Mikell* cases, which involved Army employees at cantonments in the United States, were erroneously determined, inasmuch as those areas were not "in the field", either under the traditional limitations, or within the intention of Congress in reaffirming those limitations in connection with the Uniform Code. Krueger Br. 12-16.

E. But it is not necessary to resort to what might be deemed mere debating points. It is sufficient to point to the two instances that have come before this Court where the Government relied on the war power to support an extension of military jurisdiction over civilians beyond the limits traditional at the time of the adoption of the Constitution. *Ex parte Milligan*, 4 Wall. 2; *Duncan* v. *Kahanamoku*, 327 U.S. 304. In each instance the attempt to narrow the area of jury trial failed, although at each time in question the Nation was engaged in bitter strife that threatened its very existence, internal the first time, external the second. The war power having proved inadequate on those occasions, it obviously does not support the military trial of civilians in non-occupied territory in time of peace. The war power has accordingly nothing to do with these cases—and could not justify the military jurisdiction if it had.

2. Considerations based on Article IV, Section 3, are similarly irrelevant.

We have already, *supra*, pp. 81-87, shown that courts-martial are not legislative courts, and that, even if they were, that circumstance would not resolve the present ques-

tion. The original legislative courts, see *American Ins. Co. v. Canter*, 1 Pet. 511; were territorial courts, created in the exercise of the power granted Congress by Article IV, Section 3, to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." Since both of the present cases involve situations where the United States was on foreign soil with the consent of the foreign sovereign, the power considered in the *Canter* case and in the series of decisions that followed it in the domain of territorial courts is obviously irrelevant here, where the tribunals involved are, plainly, extra-territorial courts.

3. No combination of powers, each one of which is insufficient by itself, can authorize the present trials.

At the last Term, the Government characterized (U.S. Reply Br. 24) our examination of particular clauses of the Constitution with a view to ascertaining the source of the power now asserted as "this attempted splintering of the Constitution."

We had supposed that inasmuch as ours is a Government of enumerated powers (e.g., *M'Culloch v. Maryland*, 4 Wheat. 316, 405), it was entirely proper to look to every clause of the Constitution to see whether anything in that instrument confers the extraordinary and literally unprecedented powers that are sought to be justified in these cases.

We recognize, of course, that an exertion of Congressional power is frequently said, at least *arguendo*, to rest upon more than one clause of the Constitution. E.g., *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103; *Lichter v. United States*, 334 U.S. 742; *Hines v. Davidowitz*, 312 U.S. 52. But we are aware of no instance where a Congressional enactment was sustained under several powers, each one of which by itself was demonstrably inadequate to support the legislation.

Here, as we have shown (pp. 31-63, *supra*), Art. 2(11), UCMJ, cannot be supported as an exercise of the power "To make Rules for the Government and Regulation of the land and naval Forces," for the reason that dependent wives are no part of such forces and that any attempt to do so would contract their right to jury trial as it existed at and before adoption of the Constitution. Here, as we have also shown (pp. 26-29, *supra*), no form of treaty or international agreement could abridge that right. And no other power conferred by the Constitution (*supra*, pp. 97-100) supports the military jurisdiction that was exercised in these cases. How then could the exercise of all of the powers together do so?

It is one thing to refer to several powers, or even to a galaxy of powers in the aggregate, to justify a result by way of argument; it is quite another to assemble several powers together, each one of which is plainly insufficient by itself and to find a sufficiency in what has been collected.

Even in constitutional law, the whole cannot be greater than the sum of its parts.

E. The Court-Martial Jurisdiction Exercised in the Present Cases Cannot Be Sustained Apart From the Power to Govern the Armed Forces.

Mrs. Covert and Mrs. Smith, the two civilian women whose fate is still in issue here, were tried by *court-martial*, pursuant to Article 2(11) of the Uniform Code of *Military* Justice, and had their convictions successively reviewed by Boards of Review in the Offices of the *Judge Advocate General* of the *Air Force* and of the *Army*, respectively, and then by the Court of *Military* Appeals. The latter tribunal held, after the present cases had been argued here but before the decision last June, that "Article 2(11) of the Code is a valid exercise of Congressional power granted by the Constitution 'to make rules for the government and regulation of the land and naval forces'." *United*

States v. *St. Clair*, 7 USCMA 82, 83, 21 CMR 208, 209, decided May 25, 1956.* But this Court declared (351 U.S. at 476) that there is no need to examine the power of Congress under that clause of the Constitution.

This circumstance may indicate, as one of the non-concurring Justices commented (351 U.S. at 481), "that the Court is not prepared to support the constitutional basis upon which the Covert and Smith courts-martial were instituted and the convictions were secured." But what may well be a more compelling consideration at this juncture is that unless the power to govern the armed forces is examined in these cases—and, in its application to these dependent wives, sustained—no other power supplies the necessary constitutional basis for their prosecution.

1. Absent the Clause 14 power, no law made criminal the acts for which these women were tried, a feature that plainly differentiates the Ross case.

United States v. *Wiltberger*, 5 Wheat. 76, teaches that, in order successfully to prosecute an American citizen for an act committed within foreign territory, some Act of Congress must render that act criminal. Since the legislation in force at the time Wiltberger was apprehended did not punish manslaughter committed on an American vessel moored to a foreign shore, he went free.

In the *Ross* case, 140 U.S. 453, the petitioner was tried by an American consul for a murder committed on an American vessel in Yokohama harbor, within Japanese waters. Section 5339 of the Revised Statutes[28] made murder punishable by the United States "when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular

* Reaffirmed in *United States* v. *Rubenstein*, USCMA No. 7228, Jan. 25, 1957.

[28] In the Criminal Code, R.S. § 5339 was distributed among three sections, §§ 272, 273, and 275. In the 1948 revision, those three sections were combined into two, the present 18 U.S.C. §§ 7 and 1111.

state, on board any vessel belonging in whole or in part to the United States." Ross plainly fell within that provision, under which he could also have been tried in a United States District Court in the first judicial district in which he was found or to which he was brought. R. S. § 730; later Judicial Code, § 41; now 18 U.S.C. § 3238. See *United States* v. *Flores*, 289 U.S. 137; cf. *United States* v. *Rodgers*, 150 U.S. 249.

The only issue in the *Ross* case was whether Ross had been properly tried by a consular court. The United States, in diplomatic exchanges (see 140 U.S. at 473-474), had successfully maintained its right to try Ross notwithstanding he was a British subject. And, apart from what country had the power to try him, apart from what court of this country might properly do so, one point was plain: Ross had violated the Act of Congress that made punishable murder committed on any American ship within the admiralty jurisdiction of the United States.

The correctness of the foregoing analysis is confirmed by what the Solicitor General argued in support of Ross's conviction (Brief for the U.S., No. 1683, Oct. T. 1890, pp. 19, 20):

> "The law which he violated was the law made by the United States for the government of United States vessels; * * *
>
> "This law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such foreign territory, then the law under which he enlisted again becomes supreme."

Thereafter it was well settled that, in order to support a conviction in an extraterritorial court, some Act of Congress must be shown to have been violated (*Biddle* v. *United States*, 156 Fed. 759 (C.A. 9)), although, assuredly, the search frequently turned up some Act of purely local application. See Note, *The United States Court for China*, 49 Harv. L. Rev. 793.

So we turn to see what enactment made criminal what the two women here concerned were accused of doing.

In the present cases, the Act of Congress alleged to have been violated was Art. 118, UCMJ, then 50 U. S. C. § 712:

"Art. 118. Murder.

"*Any person subject to this code* who, without justification or excuse, unlawfully kills a human being, when he—

"(1) has a premeditated design to kill; or

"(2) intends to kill or inflict great bodily harm; or

"(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

"(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) or (4) of this article, he shall suffer death or imprisonment for life as a court-martial may direct."[29]

We have italicized "Any person subject to this code," because those words underscore the dilemma that results when inquiry into the power of Congress to govern the armed forces is avoided: If Art. 2(11) is a valid exercise of that power, then dependent wives are subject to the Uniform Code of Military Justice, and murder committed by them is duly denounced and made punishable by Art. 118. But if the question of the Clause 14 power is not answered, then it is begging the question to say that they have violated a provision which is only applicable to those who are subject to the Code of Military Justice by virtue of Clause 14 of Art. I, Sec. 8.

In this connection, it is highly significant that the punitive articles of the Uniform Code are most explicit in

[29] Since Jan. 3, 1957, this is 10 U.S.C. § 918, with changes in language presently immaterial.

setting forth the just who is affected thereby. Thus, Art. 113,[30] Misbehavior of sentinel, is applicable only to "Any sentinel or look out." Certain other punitive articles—Arts. 85, 86, 88, 91, 99, 133—apply only to members or particular members of the armed forces. Three punitive articles—Art. 83, Fraudulent enlistment, etc.; Art. 104, Aiding the enemy; and Art. 106 Spies—apply in terms to "Any person". Art. 47 (old 50 U.S.C. § 622; new 10 U.S.C. § 847), Refusal to appear or testify, applies to "Every person not subject to this code," and makes such refusal a civil offense punishable in United States district courts and in specified territorial tribunals. Art. 48 (old 50 U.S.C. § 623; new 10 U.S.C. § 848), Contempts, applies in terms to "Any person." Every other punitive article reads as does Art. 118, here involved, viz., "Any person subject to this code."

Similarly, the Articles of War carefully distinguished between "Any person subject to military law" and "Any person"; the only Articles of 1916-1948 reaching the broader class were AW 32, Contempts; AW 82, Spies; and AW 81, Relieving, Corresponding With or Aiding the Enemy ("Whosoever").

Consequently, it is not sufficient in these cases to show that the two civilian women here concerned killed their husbands. It is a prerequisite to charging them with violation of an Act of Congress to establish that they were, as a matter of law, subject to the Uniform Code. And the latter showing cannot be made without considering the scope and reach of Clause 14.

Otherwise stated, unless one comes squarely to grips with the extent of the power "To make Rules for the Government and Regulation of the land and naval Forces," no

[30] At this juncture, it seems more convenient to give the U.S.C. citations to the punitive articles, Part X of the UCMJ, *en bloc*. They were formerly 50 U.S.C. §§ 671-728, and are now 10 U.S.C. §§ 877-934. The number of the UCMJ Article is a part of the boldface section heading in both U.S.C. versions.

Act of Congress has been shown to be applicable to these two women, who then, unlike Ross, cannot be charged with any violation of a Congressional enactment. (We assume that there will be no need to reargue the proposition that the United States can exercise no common law jurisdiction in criminal cases. *United States* v. *Hudson*, 7 Cranch 32; *United States* v. *Coolidge*, 1 Wheat. 415.)

2. Only Clause 14 supports the broad delegation to the President to regulate the procedure of courts-martial, to prescribe rules of evidence, to define offenses, and to determine the elements of criminality at military law.

The military opinions in the present cases, in the several Boards of Review as well as in the Court of Military Appeals (No. 701, R. 42-121; No. 713, R. 23-94), plainly show that the only contested issue at each trial was whether the respective mental states of Mrs. Covert and Mrs. Smith negatived their legal responsibility.

On that issue, medical and legal opinions in both cases were in sharp conflict, not only with each other but also among each other. The question was finally resolved, in each case, by a sharply divided bench in the Court of Military Appeals—and there the issue turned, in part on Chap. XXIV of the 1951 *Manual for Courts-Martial*, prescribed by the President, and in part on the terms of an identical document promulgated "By order of the Secretaries of the Army and Air Force", entitled *Psychiatry in Military Law*, and denominated Air Force Manual 160-42 in the Air Force and Technical Manual 8-240 in the Army.

Mrs. Smith's conviction was affirmed, while that of Mrs. Covert was reversed. In both cases, the Court of Military Appeals applied the tests and standards for sanity versus insanity that the President and the heads of the two military departments had laid down; and that Court's opinions in the two cases (No. 701, R. 97-121; No. 713, R. 52-94) show that the outcome in each turned on the precise terms of the two manuals just cited.

What is there in the Constitution that endows the President and two heads of military departments with such untrammelled power over the liberty and future of two civilian women?

In this connection, it is important to note that, within the framework of the Uniform Code, the President has well-nigh plenary power over both the substantive and the adjective law applied by courts martial and their appellate agencies. Art. 36(a), U.C.M.J., then in force as 50 U.S.C. § 611(a), provided:

> "36(a) The procedure, including modes of proof, in cases before courts martial * * * may be prescribed by the President by regulations which shall, *so far as he deems practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code."[31]

We have added the italics to indicate the breadth of the power.

To the extent that an accused before a court martial is in uniform and a member of the land and naval forces, this uncanalized delegation is not troublesome. For Article II, Section 2, makes the President the Commander-in-Chief of the Army and Navy, and in military matters he may, at least in general, act through the heads of military departments. 7 Op. Atty. Gen. 453; but see *Waring* v. *United States*, 127 C. Cls. 336, 363-365; *Seltzer* v. *United States*, 98 C. Cls. 554, 561-562; *Weller* v. *United States*, 41 C. Cls. 324, 335-336; *Truitt* v. *United States*, 38 C. Cls. 398. And, as this Court has held, the President's inherent power as Commander-in-Chief enables him to appoint a court-martial for the trial of military personnel even in the absence of a statute specifically conferring that power upon him. *Swaim* v. *United States*, 165 U.S. 553, 555-558.

[31] Now, with some verbal changes, 10 U.S.C. § 836(a).

As the Court of Claims said below in the same case (28 C. Cls. 173, 221-222):

> "The power to command depends upon discipline, and discipline depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of the military tribunal. If the President has no authority in matters pertaining to military tribunals unless it be 'expressly' granted by Congress, then Congress, by the simple expedient of exclusively granting power to appoint courts-martial and approve sentences to a few officers of the Army and tacitly ignoring the President, could practically defeat the express declaration of the Constitution, and strip the office of commander in chief of all real power of command."

But the foregoing doctrine is applicable only to the armed forces, of which the President is the constitutional Commander-in-Chief, and which he commands within the framework of the rules that Congress has made for their government and regulation. In the present cases, however, it is said that there is no need to inquire whether the Clause 14 power reaches civilian wives. But if that power does not have so broad a scope, how then can the President's power as Commander-in-Chief reach civilian wives either?

Plainly "land and naval Forces" in Clause 14, Sec. 8, Art. I, is coextensive with "the Army and Navy of the United States" in Sec. 2, Art. II.[32] If Congress has power to make rules for the government and regulation of the forces, then the President has power to command them. But if the question of Congressional power is put to one side, how can it follow that the President is still Commander-in-Chief, with power to bring to trial, for offenses which he has defined and pursuant to rules of procedure and of evidence which he has prescribed, and with power

[32] The powers of the President and the Congress over the Militia are not relevant in the present connection.

to punish, within limits which he can fix and from time to time vary? Art. 36, UCMJ [formerly 50 U.S.C. § 637, now 10 U.S.C. § 856]; MCM, 1951, chap. XXV; and e.g., Ex. Order 10565, Sept. 28, 1954, 19 Fed. Reg. 6298, 6299; Ex. Order 10652, Jan. 10, 1956, 21 Fed. Reg. 235.

The short of the matter is that the entire system of military justice depends for its functioning on the powers vested in and exercisable by the President as Commander-in-Chief of the armed forces. Without action by the President, there would be no rules of procedure, no rules of evidence, no definition of military offenses, and no maximum punishments. The decisions of the Court of Military Appeals construing various provisions of the *Manual for Courts-Martial* show how much of military jurisprudence rests squarely upon what the President has set forth in that volume; take that book away, and only an essentially unworkable skeleton would be left.

If a given individual is a member of those forces, no substantial problem arises in consequence of the President's headship of the system. But once inquiry into the scope of Congressional power to govern the land and naval forces is put to one side, then the system itself must topple, because the President's essential part therein can only be sustained on the basis of his power and responsibilities as Commander-in-Chief.

If dependent wives are properly a "part" of the land and naval forces (*Toth* v. *Quarles*, 350 U.S. at 15), then the President is *their* Commander-in-Chief as well. But if it be assumed that they are not, or that the question whether they are need not be answered, then the President has no command powers over them. And unless he has such powers, the unfettered delegation to him, without any standards for guidance, of the power to determine by what rules the criminal responsibility of civilian citizens is to be measured, must necessarily fall as completely invalid. The Constitution confers upon the President no

such power to legislate for the conduct of persons whom he does not command as the Commander-in-Chief of the armed forces.

3. If Congress can subject these women to trial by court-martial in time of peace, it is not bound to extend to them the present statutory safeguards.

Last June, the Court said that the Uniform Code of Military Justice (351 U.S. at 474) "was carefully drawn by Congress to include the fundamental guarantees of due process, and in operation it has provided a fair and enlightened system of justice." And, further (351 U.S. at 478, 479) that the Code "would afford more safeguards to an accused than any other available procedure. * * * In addition to the fundamentals of due process, it includes protections which this Court has not required a State to provide and some procedures which would compare favorably with the most advanced criminal codes."

There is no suggestion that the result would have been different had some or all of these safeguards not been provided, and we think it follows from the conclusion reached last Term that if Congress has power to cause civilian wives to be tried by court-martial, it is not bound to establish any particular system of military justice for the conduct of such trials. If Congress can subject dependents to the Uniform Code of Military Justice, it can subject them to Articles of War, in the form in which those Articles were formerly cast.

Thus, traditionally, proceedings of courts-martial could be returned to the court by the reviewing authority for revision, with a view to reconsidering an acquittal or to increasing the severity of a sentence. 6 Op. Atty. Gen. 200; 7 Op. Atty. Gen. 338; Winthrop, *694-*702 (reprint, pp. 454-459); Dig. Op. JAG, 1912, p. 170, ¶ CIIF; *id.*, pp. 568-569, ¶ XIV H2. And that process had the approval of this Court.

In *Ex parte Reed*, 100 U.S. 13, after a navy court-martial had sentenced the accused, the convening authority returned the proceedings for revision of the sentence. A new sentence was adjudged, which (100 U.S. at 20) "was different from the preceding one in two particulars, and in both it was more severe." This Court upheld the legality of the proceedings (pp. 21, 22).

Similarly, in *Swaim v. United States*, 165 U.S. 553, the proceedings were twice returned to an army court-martial for revision, each time resulting in a more severe sentence. The President, who was the convening authority in that case, accompanied his communication to the court-martial with the opinion of the Attorney General on the case, remarking that that opinion had his concurrence, 165 U.S. at 563. The Attorney General had covered the merits, and had strongly indicated that in his view General Swaim should have been sentenced to dismissal: "It should not be necessary to prove that an individual is a moral monstrosity in order to demonstrate his unfitness to be a trusted officer of the army." See 28 C. Cls. 173, 195, 198; 18 Op. Atty. Gen. 113, 117. Yet this Court had no difficulty in sustaining the proceedings.

It is not necessary, however, to go back even into the late Nineteenth Century to demonstrate the legal severities inherent in a military code. The Articles of War of 1916, which first subjected accompanying dependents overseas to military law (*supra*, pp. 40-41, 55; Covert Br. 52-55) exemplified in their operation features that were entirely lawful but excessively severe and summary.

(a) The practice of convening authorities returning cases to courts-martial for the reconsideration of acquittals and of sentences not deemed sufficiently severe, just considered, was general throughout the first World War. See *Trials by Courts-Martial*, Hearings before the Senate Committee on Military Affairs on S. 5320, 65th Cong., 2d sess., pp. 34-35, 246-266; *Establishment of Military Justice*,

Hearings before the Senate Committee on Military Affairs on S. 64, 66th Cong., 1st Sess., pp. 1379-1380. Not until criticism became articulate after the Armistice (e.g., Bruce, *Double Jeopardy and the Power of Review in Court Martial Proceedings*, 3 Minn. L. Rev. 484; Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 Yale L. J. 52, 61-63) did the War Department prohibit the practice. GO 88, WD, July 14, 1919, effective August 10, 1919.[33] In the following year, by AW 40 of 1920, the prohibition was made statutory.

But any subsequent Congress would have the power to return to the older system. It is significant that the Fifth Amendment was not mentioned in the *Swaim* case, although a similar course of obtaining a more severe sentence in a civilian criminal prosecution would have run afoul of prohibitions against double jeopardy. *Kepner v. United States*, 195 U.S. 100.

(b) Nor is it necessary for Congress to provide appellate review in court-martial cases, as the instance of the 1917 Houston riot demonstrates.

There, Sgt. William C. Nesbit of Company I, 24th Infantry, as well as 62 other accused, were jointly tried for willful disobedience, mutiny, murder, and assault with intent to murder. The trial lasted over three weeks and the record extended to nearly 2,200 pages. *Establishment of Military Justice*, *supra*, pp. 1125-1126. At the conclusion of the trial, 13 of the accused were sentenced to death by hanging. Those death sentences were all approved by the convening authority on December 10, 1917, and on December 11, the following day, they were carried out. GCMO No. 1299, Hq. Southern Department, Fort Sam Houston, Texas, Dec. 10, 1917. The only "review" made prior to the execution was that made by the convening

[33] The text of GO 88, so far as here material, appears at p. 28, n. 12, of Respondent's Brief in No. 427, Oct. T. 1948 (*Wade v. Hunter*, 336 U.S. 684).

authority's staff judge advocate, and the first information that the War Department had of the case came from the press. *Establishment of Military Justice*, *supra*, p. 94.[9]

There was, of course, considerable comment (*Establishment of Military Justice*, *supra*, pp. 94-97, 1357-1358; *Trials by Courts-Martial*, *supra*, pp. 39, 41-42, 193-199, 209), and the Department promptly locked the stable door by prohibiting the execution of further death sentences until after The Judge Advocate General had reviewed the record of trial. GO 169, WD, Dec. 29, 1917; text in *Trials by Courts-Martial*, *supra*, at 209. But no one contended, or could contend, that what was done in the Houston riot case had been illegal. For the court had been appointed by a department commander, who in time of war, as this was, could approve and confirm death sentences for murder and mutiny without reference to higher authority and without review by The Judge Advocate General. AW 48 of 1916.

What is there in the Constitution, as interpreted by the Court last June, that prevents Congress from reverting to the summary processes and to the revision procedures of the same military code of 1916 that first subjected civilians to military law in time of peace under its Art.

[9] "The hanging of the thirteen negro troopers for complicity in the Houston riot was unknown to practically all officials of the War Department here until it was announced at Fort Sam Houston. So far as can be learned, the departmental commander carried out the executions as a routine affair, as he is warranted to do in time of war.

"No such wholesale execution in the army has occurred within the memory of the present generation. The last of its kind was the execution of members of the so-called 'St. Patrick's battalion' by Gen. Scott during the Mexican war." Washington *Post*, Dec. 12, 1917, p. 4.

For such comfort as may be derived therefrom, it is proper to note that, thereafter, the record of the Houston riot case was reviewed in the Office of The Judge Advocate General and was found to be legally sufficient. *Establishment of Military Justice*, *supra*, at 1124-1126.

2(d)? It may be argued that, as a practical matter, no Congress would take such a retrograde step, and that the present Congressional temper is reflected in the procedural safeguards of the Uniform Code. But the Department of Defense has been pressing for a revision of the Code that is aimed at strengthening its disciplinary features (S. 2133 and H.R. 6583, 84th Cong., 1st sess.), in consequence of increasing military dissatisfaction with its provisions. See Shine, *Fallacious Attacks Against the Code*, 20 The Judge Advocate J. (July 1955) 1, collecting numerous references. We are advised that somewhat similar bills will be introduced in the 85th Congress.

It is significant that, even under the Code as it now stands, there is still no provision for bail (*supra*, pp. 95-97), that Fourth and Fifth Amendment protections thereunder are markedly narrower than in United States courts, and that there is no right of confrontation. Covert Br. 108-110. These features should not occasion surprise. For it is inevitable that, once indictment by grand jury and trial by petit jury are casually brushed aside as not requiring extended mention (cf. 351 U.S. at 479), other constitutional protections will be similarly diluted, disregarded, and, in the end, disrespected. And it is not yet clear that any constitutional guarantees apply to persons who are subject to military law.

Winthrop thought that the first eight Amendments did not apply to such persons at all. See *241 (reprint p. 165, note 38). The Court of Military Appeals has echoed the traditional view. *United States* v. *Clay*, 1 USCMA 74, 77, 1 CMR 74, 77, quoted at Covert Br. 108. And this Court has up to now refused to accord to military personnel the same right to collateral review for deprivation of fundamental constitutional rights by military agencies that it has regularly granted those convicted by federal and state criminal courts. Compare *Johnson* v. *Zerbst*, 304 U.S. 458, and *Legra* v. *Denno*, 347 U.S. 556, with

Burns v. *Wilson*, 346 U.S. 137, and 346 U.S. 844. If, as was held in the case last cited, mere consideration of an accused's constitutional contentions by the military authorities insulates the matter from further review in a court of the United States, then military deviations from the constitutional norms established by the civil courts can never be corrected. And, only a few months ago during the present Term, another attempt to equate the scope of collateral review in military convictions with that available for scrutiny of civilian convictions was bitterly opposed by the Government, and failed. *Kiroski* v. *United States*, 145 F. Supp. 239 (C. Cls.), certiorari denied, 352 U.S. 954 (No. 533).

In *Board of Education* v. *Barnette*, 319 U.S. 624, 642, note 19, the Court said:

> "The Nation may raise armies and compel citizens to give military service. *Selective Draft Law Cases*, 245 U.S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."

If Congress can subject dependent wives to military law, it can necessarily, as has just been demonstrated, deprive them of many freedoms. From whence does Congress draw such power, from whence can it draw such power, if not from Clause 14? The opinion last June leaves that question unanswered. But we should be aware, fully aware, of just how many freedoms are lost, and how many more endangered, once civilians are held amenable to trial by court-martial. And it needs to be sharply emphasized that, on the basis of the Court's opinions, no constitutional grant of power for such a wholesale withdrawal of protection has been identified.

4. The military considerations adduced are relevant only to the Clause 14 power.

In the present cases, where the results were reached last June after ostensible rejection of whatever powers the Constitution has conferred upon Congress to govern the armed forces, the Court's opinion none the less makes it obvious that military considerations were necessarily relied upon to uphold the courts-martial that are under review.

Thus it is said (351 U.S. at 476-477) that "we, as a Nation, have found it necessary to the preservation of our security to maintain American forces in some sixty-three countries"; that "the lives of military and civilian personnel alike are geared to the local military organization which provides their living accommodations, medical facilities and transportation from and to the United States"; and that by enacting Art. 2(11) "Congress has provided that all shall be subject to the same system of justice and that *the military commander who bears full responsibility for the care and safety of those civilians attached to his command shall also have authority to regulate their conduct.*" [Italics added.] These, without question are purely military considerations. They are relevant to—but relevant only to—the power "To Make Rules for the Government of the land and naval Forces."

It was said (351 U.S. at 480) that No. 713 "presents no problem of * * * the power of Congress to provide for trial of Americans sojourning, touring, or temporarily residing abroad." But *In re Ross*, 140 U.S. 453, which is the foundation stone on which the military jurisdiction in the present cases was rested in June, involved the trial by an American consular court of a British subject who was temporarily in Japan only while the American ship in whose crew he served was lying at anchor in Yokohama harbor. 140 U.S. at 456-457, 470-475. The difference between the situation of Ross and that of the two women

involved here is that the latter were abroad for a far less temporary stay, the exact length of which was dependent on their respective husbands' tours of military duty, and that their American links were far stronger and deeper than the one that tied Ross to his ship, and, through that ship, to American consular jurisdiction. Again, the governing consideration expressed in the Court's opinion last June is the relationship of these two women to the American armed force of which their husbands were members.

Thus the Court has sustained an obvious Congressional attempt to exercise the power "To make Rules for the Government and Regulation of the land and naval Forces" while disclaiming all inquiry into the extent of that power.

The Government's answer to the foregoing (U.S. Memo. 7-8) seems to be that "The so-called 'military' references cited by petitioners were directed to the propriety of using the established courts-martial system to effectuate this Nation's international agreements concerning the exercise of jurisdiction." There is more to the same effect (U.S. Memo. 2-8), all of it based on the premise that foreign nations, by consenting to an exercise of jurisdiction by the United States through military courts, have somehow invested those courts with power to try individuals not otherwise triable therein.

The fallacies underlying that premise have already been set forth (*supra*, pp. 16-20, 26-31) and need only be summarized here:

First, the consent of the territorial sovereign to an exercise of jurisdiction by the personal sovereign does not automatically make the law of the personal sovereign reach the offense (*United States* v. *Wiltberger*, 5 Wheat. 76), nor does it automatically render the offender triable in a particular court of the personal sovereign (*Toth* v. *Quarles*, 350 U.S. 11).

Second, the power to try a particular person by a particular court must be bottomed on and derived from a

grant of power in the Constitution. Cases cited at pp. 30-31, *supra*.

Third, since nothing in the Constitution empowers a court-martial to try dependent wives in time of peace not in occupied territory, and thus deprive those wives of their right to a jury trial, no treaty or international agreement can do so, for the reason that international arrangements cannot infringe upon constitutional guarantees. Cases cited at pp. 26-29, *supra*.

Again, in its Supplemental Brief, the Government argues at length that military jurisdiction over civilians "is a practical necessity * * * to accomplish the military mission" (U.S. Supp. Br. 21-40), and supports its contentions with statements from overseas military commanders which serve to document that conclusion (*id.*, pp. 97-129).

Thus the military considerations are relevant as showing why it might be desirable to amend Clause 14 to reach civilian wives—but, since the Court appears unwilling so to do violence to Clause 14 in the absence of a constitutional amendment, mention of those considerations only serves—we submit with all deference—to underscore the untenability of last June's opinion.

5. Not until these cases were on appeal were the present trials by court-martial sought to be justified by any power other than that conferred by Clause 14.

We have already pointed out (Covert Br. 92-97; Krueger Br. 17) that the references to and invocation of the treaty power are afterthoughts, which are supported neither by the pleadings in the two cases, nor by the legislative history of Art. 2(11), nor by the uniform practice and holdings of the military authorities, the Court of Military Appeals therein included.

The fact—the hard, brutal, stubborn fact of the matter is that, not until the present cases were brought by the Government to this Court, did it occur to anyone to attempt

to support the trials of civilians by court martial now in question on any constitutional basis other than the one upon which both prosecutions were instituted and both convictions secured, viz., the power to govern the armed forces.

The dilemma that faces the Government is apparent.

The present trials by court-martial cannot be supported as an exercise of the power to govern the armed forces, because historically, conceptually, and constitutionally, dependent wives have never been a part of those forces and cannot be treated as such without doing violence to the only double guarantee in the Constitution—a jury trial.

Yet any effort to avoid inquiry into the power to govern the armed forces impales the prosecution upon, not just a horn, but a veritable bed of spikes; for once that power is put to one side, there is none available under which a "legislative" court can be created, the acts committed have not been made punishable, the procedure followed and the law applied have been legislated by executive officers who lack command powers over the accused, and those individuals lose a whole bundle of solemnly guaranteed individual rights—all without any word from any source to say how or by what constitutional grant such deprivation has been authorized.

In *Toth* v. *Quarles*, 350 U.S. 11, this Court in substance held that it was better that an occasional homicide should go unpunished than that the Constitution should be stretched to reach the offender—even though Toth appeared to be a wanton, cold-blooded participant in an unjustified killing.

These two women, unlike Toth, have not gone unpunished. Mrs. Smith has been confined for over four years, for an act done while she was, at the very least, emotionally unbalanced (Krueger Br. 3-5, 23-24). Mrs. Covert served

more time than Toth's two accomplices (Covert Br. 119-121), for an act done while she was, by the weight of the uninfluenced medical testimony, actually psychotic (*id.*, 116-119). She was with child while on trial; the child was born while she was in prison; and it was taken from her a few months later (R. 3; Covert Br. 119, n. 77).

The Court need therefore have no compunction in freeing these two women. But we submit that the Court should reflect long and seriously before it permits to stand as law the injury done to the Constitution in the bases, the premises, and the reasoning of the opinion hastily announced last June. Damage of that character, so our constitutional history all too clearly establishes, takes decades to repair.

F. Military Trial of Civilians Is Utterly Foreign to the American Tradition.

Last June, this Court for the first time in its—and the Nation's—history sustained the trial of civilian women by courts martial in time of peace and in other than occupied territory.[15] We submit that this result constitutes a sharp and unwarranted break with both American history and American tradition. That tradition is essentially anti-militarist, a heritage from the despotism of the first two Stuarts and of Cromwell.

James I and Charles I issued commissions of martial law, warrants to punish at will; these were declared illegal by the Petition of Right in 1628. See Maitland, *The Constitutional History of England*, 324-325. Cromwell in time replaced the Stuart tyranny with one of his own devising far more rigorous, the division of the realm

[15] *Madsen v. Kinsella*, 343 U.S. 341, was a trial by a military government court composed of civilians, and sitting in occupied territory; it is therefore no precedent here, nor was it cited by the Court.

into eleven districts each under a Major-General.[36] Such were the excesses of this turning over of normal processes to the military that, at the Restoration, all parties and factions were agreed that there must be no standing army.[37]

The drafters of the Declaration of Independence were vividly aware of England's experiences with military rule and military trials during the previous century. It was therefore in the established tradition of the English defenders of law against despotism that among the "long train of abuses and usurpations" with which that instrument charged George III were these:

> "He has kept among us, in times of peace, standing Armies without the consent of our Legislature.
>
> "He has affected to render the Military independent of and superior to the Civil Power.
>
> "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

[36] "Military dictatorship supervened, naked if not wholly unashamed. . . . [Cromwell] now [1655] proceeded to divide England and Wales into eleven districts, over each of which a Major-General was placed, with the command of a troop of horse and a reorganised militia. The Major-Generals were given three functions—police and public order, the collection of special taxes upon acknowledged Royalists, and the strict enforcement of Puritan morality. . . . If in a tremendous crisis Cromwell's sword had saved the cause of Parliament, he must stand before history as a representative of dictatorship and military rule who, with all his qualities as a soldier and statesman, is in lasting discord with the genius of the English race." 2 Churchill, *A History of the English Speaking Peoples*, 309-310, 316.

[37] "But both Crown and Parliament were to be free of the Army. That force, which had grown to forty thousand men, unequalled in fighting quality in the world, was to be dispersed, and nothing like it was on any account to be raised ever again. 'No standing Army,' was to be the common watchword of all parties." 2 Churchill, *A History of the English Speaking Peoples*, 330-331.

"At the Restoration the very name of a standing army had become hateful to the classes which were to be the ruling classes." Maitland, *The Constitutional History of England*, 326.

"For quartering large bodies of armed troops among us: * * *

"For depriving us in many cases, of the benefits of Trial by Jury: * * *"

And the same fierce opposition to a standing Army that united the English people in 1660 appeared in the debates on the Army Clause in the Constitutional Convention, in the ratifying conventions, and in the First Congress. *Supra*, pp. 37, 44.

Indeed, the doctrinaire concepts that were then voiced, which equated the existence of a permanent defense force under the command of a constitutional President with that of an extra-legal levy maintained by a King in defiance of Parliament, long hampered the development of a sound military policy for the United States. See Upton, *The Military Policy of the United States;* Spaulding, *The United States Army in War and Peace;* both *passim*. What is here significant, however, is the scope of the anti-military feeling, the intensity with which those convictions were held, and the real grievances which had given birth to both.

The only manner in which military jurisdiction was ever sought to be extended, after 1789 and prior to 1916, was by way of the military commission. That tribunal, first devised by General Winfield Scott in Mexico as an instrumentality of military government (Winthrop, *1297-*1299 [reprint, pp. 832-833]), a perfectly legal use, was transformed by the not entirely happy genius of Judge Advocate General Holt into a means of trying citizens within the United States during and after the Civil War. Winthrop, *1299-*1302, *1307-*1312 (reprint, pp. 833-834, 838-841). This was the forum before which were successively haled Vallandigham, Milligan, the Lincoln Conspirators—and a host of lesser lights, all as duly recorded in Dig. Op. JAG, 1868, pp. 225-232.

Vallandigham, his petition for habeas corpus denied (*Ex parte Vallandigham*, Fed. Case No. 16816 [C.C.S.D. Ohio]), did not appeal, because he had been taken beyond the Union lines (Fairman, *Mr. Justice Miller and the Supreme Court*, 83-84); and his attempt to seek review of the military proceedings by certiorari failed on procedural grounds (*Ex parte Vallandigham*, 1 Wall. 243).

The Trial of the Lincoln Conspirators, though sought to be legally justified (11 Op. Atty. Gen. 215 [one sentence opinion]; 11 Op. Atty. Gen. 297), was bitterly assailed by competent contemporary critics as utterly illegal and unconstitutional. Beale, ed., *The Diary of Edward Bates* [Atty. Gen. in first Lincoln Administration] (H. R. Doc. 818, 71st Cong., 3d sess., vol. IV), pp. 481, 483, 498-503. No one since has ever even attempted to justify that proceeding. Winthrop cites it a few times to illustrate incidental matters, but his silence as to its substance is deafening.

It could not be otherwise, in view of the next case. For Milligan, pursuing the proper procedural course, obtained from this Court a ringing declaration as to the boundaries of military jurisdiction in the still classic *Ex parte Milligan*, 4 Wall. 2. In the light of that ruling, the illegality of a military trial of civilians, in the District of Columbia, where the civil courts were open and unobstructed, was patent. Thereafter, when it appeared that the legality of military trials of civilians under the Reconstruction Acts of 1867 (Winthrop, *1331-*1335 [reprint, pp. 853-855]) might again come before this Court for decision (*Ex parte McCardle*, 6 Wall. 324; *Ex parte Yerger*, 8 Wall. 85), adjudication was prevented, in one instance by a legislative withdrawal of appellate jurisdiction (*Ex parte McCardle*, 7 Wall. 506), in the other by a release of the petitioner from the challenged custody (2 Warren, *The Supreme Court in United States History* [1935 ed.] 496-497).

After that, passions cooled, and in the 1880 edition of the Dig. Op. JAG there is hardly any trace of those military trials of civilians that had so disfigured the 1868 compilation.

The circumstance that, for half a century after *Ex parte Milligan*, no military person ever sought to extend the triability of civilians by military tribunals beyond the limits then established, is a striking illustration of the persistence of the sturdy Anglo-American tradition of the subordination of the military to the civil power, as well as a tribute to the spirit of legality that Winthrop and successive Judge Advocates General had infused into the thinking of the services. The precedents are fully set out *supra*, pp. 36, 40-42, 47, and at Covert Br. 36-41, and will not be repeated—though it is certainly not inappropriate to remark that, throughout all of the Nineteenth Century, no Government lawyer, civilian or military, ever found in *The Federalist* or in the Necessary and Proper Clause what the Government reads into both today, some 170 years after each was written (U.S. Supp. Br. 69-82).

Not until 1916 was any attempt made to enlarge the limits of military jurisdiction over civilians, viz., the enactment of AW 2(d), and even then no articulated justification therefor was offered by anyone. Whether that extension was constitutional is an issue now raised for the first time.

The only extension in practice was essentially an aberration, the widened scope of "in the field," which is now without legislative support (Krueger Br. 12-16). It is interesting to note that Senator Chamberlain's unilateral attempt to enlarge military jurisdiction by declaring all disaffected persons to be spies (*supra*, pp. 52-53), was based on a similar enlargement of the scope of "in the field." The first section of his bill (S. 4364, 65th Cong., 2d sess.) provided (italics added):

"That owing to changes in the conditions of modern warfare, whereby the enemy now attempts to attack and injure the successful prosecution of the war by the United States, by means of civilian and other agents and supporters behind the lines spreading false statements and propaganda, injuring and destroying the things and utilities prepared or adapted for the use of the land and naval forces of the United States, *thus constituting the United States a part of the zone of operations* conducted by the enemy, * * * "

It hardly required President Wilson's statement (*supra*, p. 53) to make it known that such a measure was unconstitutional.

Apart from the few aberrant World War I cases (Krueger Br. 12-16; *supra*, pp. 36, 99), there was no extension of military jurisdiction over civilians in practice until 1941 (Covert Br. 56), and dependent wives seem never to have been subjected to trial by court-martial prior to 1950 (Covert Br. 63).

But World War II, like the Civil War, brought another attempt, by means of tribunals of martial law, to extend the limits of military jurisdiction beyond the limits that were well recognized when the Constitution was adopted.

This attempt also failed (*Duncan* v. *Kahanamoku*, 327 U.S. 304), and the majority of the Court placed the result, not on the narrow ground taken by Stone, C. J., to the effect that the Government failed to show any such necessity as would justify the military trial of a civilian (327 U.S. at 335-337), but on the broad proposition that any such trial (p. 324) would "exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions * * * "

So there is left only the attempt to subject to military law civilians accompanying the forces overseas, which

dates only from 1916, and which is now before this Court as a question of first impression.

If that comparatively recent instrumentality for eroding the right to a jury trial had ever been rested on some articulated constitutional basis, one might perhaps pause before condemning it out of hand; but, as we have shown (*supra*, pp. 54-57, and Covert Br. 52-60), it never was; and moreover Congress was at no time advised that the question even presented a constitutional problem. In consequence, once the notion that the excepting clause of the Fifth Amendment somehow constituted a grant of power was exploded by *Toth* v. *Quarles*, 350 U.S. 11, there was no justification at hand to support Art. 2(11). And the circumstance that the Court last June was unwilling to rest the present trials on the Clause 14 power under which they plainly were undertaken is certainly a significant indication that what on its face would seem to be the obvious justification was actually unavailing.

Once past the idea that dependent wives are triable by court-martial because they can somehow be comprehended within "land and naval Forces", it is plain that a court-martial is not an appropriate instrument for dispensing justice to civilians, essentially because it negatives the very concept of a tribunal qualified to deal with civilians.

Only a very few years ago, the Government was making the same point. Thus, in opposing further review of Mrs. Madsen's case, the Solicitor General said (Br. Op., *Madsen* v. *Kinsella*, No. 82 Misc., Oct. T. 1951, p. 26):

> "We submit that this system [of civilian military government courts] for administering justice among the many American civilians in occupied Germany is more consistent with our fundamental political ideals than would be the relegation of this function to purely military courts."

Unlike the tribunals considered in *Madsen*, which had some permanence, a court-martial is created by the order

of a military commander, who determines who shall be tried by it (MCM, 1951, ¶¶33, 35), and whose approval is requisite to the validity of its sentences (*supra*, pp. 84-85). But the qualities that fit an individual to administer armies in time of peace and to command them during hostilities are demonstrably different from those requisite for men whose primary duty it is to deal with law. As this Court said in *Toth* at 17,

> "* * * conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. * * * Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals."

In considering whether, in fact, the Uniform Code (351 U.S. at 474) "has provided a fair and enlightened system of justice," or whether the Code can actually (351 U.S. at 479) "compare favorably with the most advanced criminal codes," it is necessary to take into account somewhat more of the present records than is reflected in last June's opinions.

Consider the case of Mrs. Smith: She had been under psychiatric treatment for some five years before the incident now in question, and on the day of the act had been taking barbiturates and paraldehyde. Although the senior medical witness at the trial considered her unable to adhere to the right (in terms of the McNaghten rules), under the provisions of the Army's manual on psychiatry her episodes were merely character and behavior disorders

Two attempts to reopen the issue of sanity, one based on an affidavit from a medical witness that "from a purely medical point of view" his opinion was different from the one to which he had earlier adhered under compulsion of the manual, were rejected by a Board of Review.

The results of further psychiatric examinations, more favorable to Mrs. Smith, but still reflecting a difference between military and civilian psychiatry based on the Army manual, were brushed aside in fairly summary fashion by another Board of Review. The conviction was finally affirmed by the Court of Military Appeals, only one member of which was able to find in the proceedings vitiating unfairness by reason of testimonial compulsion. See Krueger, Br. 36, where the references are fully set forth. So Mrs. Smith is now serving a sentence of life imprisonment.

If it is appropriate to delve into comparative jurisprudence, as this Court seems to have done last June (*supra*, p. 127), it seems proper to ask: In what civilian American jurisdiction, federal, state, or territorial, would a life sentence have been imposed on Mrs. Smith in her circumstances? No dispassionate observer familiar with the operation of American criminal law in action will, we think, venture to point to any.

Or consider the case of Mrs. Covert: By the weight of the uninfluenced medical testimony, and all of the expert witnesses were officers of the Air Force; none was a hired champion—she was actually psychotic at the time of the act. After the trial, two of the prosecution witnesses presented unsolicited affidavits in which they retracted their trial testimony, which had been based on the same manual that had been involved in Mrs. Smith's case; one deposed that in his medical opinion the findings of the court-martial were "completely wrong", the other that those findings were "a clear-cut miscarriage of justice." A third witness, who had appeared for the defense, spelled out in detail

wherein he had considered this distraught woman who after the act had climbed into the cot where the corpse of her husband lay and had spent the night there to have been psychotic. Yet the majority of the Board of Review held that these post trial affidavits did not even raise a reasonable doubt as to her sanity. See Covert Br. 116-119, collecting the record references.

Would Mrs. Covert even have been convicted in any American civilian court? Surely no psychiatric witness in any civilian tribunal would have felt impelled to yield his medical views to the fiat of a manual, as those at her trial by court martial did.

Consider the life sentence imposed on Mrs. Covert. We have already pointed out that, at the time the writ issued below, she had already served more time than had both accomplices of Toth, who were admittedly sane, and who participated in a cold blooded murder. Covert Br. 120-121. Despite those facts, despite the evidence of her mental condition, despite the fact that she was with child at the trial, and that the child was born while she was in prison, there to be taken from her a few months later (Covert Br. 119, n. 77; R. 3, No. 701), the Board of Review concluded (R. 61) that "Anything less than life imprisonment, on the basis of the entire record before us, would be inappropriate and unwarranted."

In what American civilian jurisdiction would such a sentence have been imposed if there had been a conviction in any degree?

The suggestion earlier made (Covert Br. 120), that the sentence in the *Covert* case reflected vindictiveness, far from being dispelled by anything that has happened since, seems rather to have been thereafter substantiated. The Government opposed Mrs. Covert's motion to stay the mandate pending the disposition of the Petition for Rehearing unless she would consent to subject herself to further psychiatric probing at St. Elizabeth's during the summer.

That is to say, while the Petition for Rehearing was *sub judice*, the Government insisted that she be returned to its custody, where it offered her a choice between confinement in a jail or confinement in an asylum—as though the Air Force's military honor were somehow bound up with retrying her.[38]

Where can there be found an American prosecutor, state or federal, who would press a retrial for a woman whose legal responsibility was so very doubtful, and who had already been so grievously punished, by imprisonment and by separation from her new-born infant?

It is well to recall what the Court said in *Toth*, only at the last Term (350 U.S. at 17): "* * * it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."

American history, over seven great wars and a host of smaller ones, demonstrates the competence of our captains and our armed forces in battle. In that field they stand supreme. But in the realm of trying civilians for civilian offenses, they have something less than competence, as can be seen by anyone who reads the rather short printed records in these two cases.

The men who fashioned the Constitution of the United States were not doctrinaire libertarians, nor were they unfamiliar with the practical tasks of war. Of the 55 members of the Convention, 18—including Washington—had been officers of the Continental Army, and 13 more had held commissions in the militia. 6 Freeman, *George Washington*, 93. But they were aware of the functional as well as the traditional reasons for drawing a line between civil and military trials. Hence they wisely limited the jurisdiction of courts-martial to "land and naval Forces," including therein only those functionally connected civilians

[38] On June 18, 1956, however, the mandate was stayed by order of Mr. Justice Clark.

who were actually in the field, i.e., within the theater of actual hostilities in time of actual hostilities; or, otherwise stated, including only that narrow class of civilians who had in fact been subject to the Continental Articles of War.

We think, therefore, that, just as ordinary legislative courts cannot be invested with Article III judicial power because, as Chief Justice Marshall said, "They are incapable of receiving it" (*American Ins. Co. v. Canter*, 1 Pet. 511, 546), so courts martial cannot be invested with jurisdiction to try a class of civilians who in 1789 could claim a jury trial. Courts-martial are incapable of receiving any such jurisdiction, essentially because they "form a system of courts separate from civil courts and created by virtue of an independent grant of power in the Constitution." Brandeis, J., in *Crowell v. Benson*, 285 U.S. 22, 39, note 26.

It is argued at length that "the military needs of the international community" (U.S. Supp. Br. 81), require a different answer, and there are submitted to the Court statements by seven overseas commanders (U.S. Supp. Br. 97-129) that point out why these gentlemen sincerely believe that they must have power to try civilians by court martial, else, so they say, their military mission overseas will fail.

We point out below, pp. 142-153, both the legal and factual deficiencies in these *ex parte* statements, which do not disclose (1) that the reason for having civilian employees overseas in preference to servicemen is purely budgetary; or (2) that the armed forces overseas use the services of more than fifteen times as many foreign civilians as American civilians; or (3) that under NATO and NATO-type agreements primary jurisdiction over all civilian dependents has been conceded to the receiving states. In those circumstances, all of which are fully documented below, the assertions of necessity boil down to considerations of mere expediency.

But even if the argument of necessity had more substance than it is shown to have, it would be unavailing; and it is not new. It was made in this Court just 90 years ago, in *Ex parte Milligan*, 4 Wall. 2, where it was answered in words that still bear repetition (pp. 120-121):

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection, all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

We submit that the justification of military necessity should be declared as unavailing in 1956 as it was in 1866.

The principle that is at stake in the present cases is whether the protections of the Constitution are to be eroded because of the expediency of the passing hour or of the need for security against foreign foes. Two expressions by former members of the Court seem apposite in the present connection.

On a few years ago, Mr. Justice Jackson wrote (*The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A.J. 961, 963):

> "It seems to me that these traditional freedoms are less in danger of any sudden overthrow than of being gradually bartered or traded for something else on which the people place a higher current value. In this anxiety-ridden time, many are ready to exchange some of their liberties for a real or fancied increase in security against external foes, internal betrayers or criminals. * * * Many will give up individual rights

> for promise of collective advantages. * * * Certainly in the minds of many foreign peoples our type of individual liberty has been out valued by promises of social welfare and economic security, which they want too passionately to be critical of the price. If this indifference to traditional values should spread to us, it would be the greatest threat to our own liberties."

And, some years before that, Justice Cardozo thus expressed the American ideal of constitutionalism in his acknowledged classic, *The Nature of the Judicial Process* (pp. 92-93):

> "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith."

What is so very disturbing about the opinions last June, infinitely more so than the purely legal misconceptions on which they rest, and which have been fully demonstrated above, is the sharp break that they make with our constitutional concepts. For if "we turn to the words of the Constitution read in their historical setting as revealing the purposes of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes". (*United States v. Classic*, 313 U.S. 299, 317-318), then it is plain that the Constitution confers no power to subject to trial by court martial in time of peace civilian women whose only nexus with the land and naval forces is their marriage to servicemen.

Any accurate review of our historical and institutional heritage leads inevitably to the conclusion that the decisions in the present cases at the last Term do violence to the work and the ideals of the Founders, and to the traditions of the Constitution that they fashioned 170 years ago.

III. THE RESULT REACHED LAST JUNE IS COMPLETELY IRRECONCILABLE WITH TOTH v. QUARLES, 350 U.S. 11.

A. Every Consideration Relied on in the Present Cases Would Have Supported Toth's Trial by Court-Martial.

In comparing the present cases with that of Toth, it is essential to bear in mind that, at the time habeas corpus was sought on the latter's behalf, he was in Korea, and the writ issued to return him from Korea to the United States. See *Toth* v. *Talbott*, 113 F. Supp. 330, 331 (D.D.C.); *Toth* v. *Talbott*, 114 F. Supp. 468, 469 (D.D.C.). ("The question before the Court * * * is the legality of the restraint of the petitioner in Korea."); *Talbott* v. *United States*, 215 F. 2d 22, 24-25 (D.C. Cir.).

Therefore, since Toth was in fact in Korea, the methods by which he was brought there are immaterial, since it is of course well settled that a court is not justified in refusing to exercise jurisdiction over an offender merely because he has been brought within its jurisdiction by means which are irregular or even illegal. *Pettibone* v. *Nichols*, 203 U.S. 192; *Mahon* v. *Justice*, 127 U.S. 700; *Ker* v. *Illinois*, 119 U.S. 436. The cited cases are ample to establish that the jurisdiction of the court-martial before which Toth was to be tried could not have been impaired by reason of the circumstance that he had been brought before it by what undoubtedly was a forcible taking.

It is also essential to bear in mind that American troops were in Korea, not as enemies and accordingly exempt from Korean jurisdiction because members of an enemy force (*Coleman* v. *Tennessee*, 97 U.S. 509, 515, 516; *Dow*

v. *Johnson*, 100 U.S. 158, 165 166; *United States v. Plenty Horses*, U.S.D.C., D. So. Dak., cited in Winthrop *1212 (reprint, p. 778); *Arce v. State*, 83 Tex.Cr. 292, 202 S.W. 951), but as friends; and their exemption from Korean jurisdiction was based on the exemption accorded friendly armed forces who enter foreign territory with the consent of the foreign sovereign (*supra*, pp. 71 80).

Thus, Toth, Mrs. Covert, and Mrs. Smith, were all American citizens who were present in foreign countries with the consent of the foreign sovereign. Each was charged with committing a homicide in that foreign country, the only difference being that Toth's victim was a national of that country, while the deceased in the other two instances were American military personnel.

In all three cases, Congress sought to make the offense punishable, provided courts martial to try the offender, and sought to subject the accused to the Uniform Code of Military Justice, Toth by Art. 3(a), and the two women by Art. 2(11).

The rationale of the opinion in the present cases last June was that an American civilian committing an offense while in an American military community in a foreign country may constitutionally be tried by an American court-martial in that foreign country for an offense committed there; that the Constitution does not require trial in a foreign country before a court conforming to Article III for offenses committed there by an American citizen; that Congress may establish legislative courts for that purpose; that if was reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose; that the failure of the Uniform Code to provide for indictment by grand jury or trial by petit jury is not a constitutional defect, since in these respects the Code "does not differ from the procedures specifically approved by this Court in other types of legislative courts established abroad by Congress" (351 U.S. at 479).

That reasoning, we submit, was applicable in every particular to Toth. Yet Toth's trial by court martial was held to be beyond the constitutional power of Congress, even though, at the time he committed his offense, he was a member of the Air Force and in consequence amenable without question to military jurisdiction.

We repeat, the reasoning in the present cases was plainly adapted to reach Toth, who, when his sister filed her petition for habeas corpus to secure his release, was "accompanying the armed forces without the continental limits of the United States." Art. 2(11), UCMJ.

B. Toth's Separation From the Service Prior to the Discovery of His Offense Would Not, Under Established Extradition Doctrines, Have Varied the Result Under the Rationale of Last June's Opinions.

But even on the basis—contrary to the actual facts in his case—that Toth had sought release from custody before he was returned to Korea, i.e., on the footing that he was fighting extradition from the United States back to the jurisdiction that was seeking to try him, the rationale of the opinion in the present cases last June would have been sufficient to hold him.

For the basis of last June's opinion in these cases was that the courts-martial that tried Mrs. Covert and Mrs. Smith were legislative courts validly established. On that footing, there would be no reason to refuse to extradite an American civilian in the United States so as to place him on trial before the American court-martial sitting in the foreign country.

Congress long ago provided for extradition from the States of the Union to legislative courts in the territories (Sec. 1 of the Act of Feb. 12, 1793, c. 7, 1 Stat. 302; later R.S. § 5278; now 18 U.S.C. § 3182), a power that was always exercised without serious constitutional challenge. See *Ex parte Morgan*, 20 Fed. 298, 303-304 (W.D. Ark.);

Ex parte Krause, 228 Fed. 547, 551 (W. D. Wash.); *In re Gillis*, 38 Wash. 156, 80 Pac. 300.

Congress also provided for extradition from the United States into foreign territory occupied by the United States (Act of June 6, 1900, c. 793, 31 Stat. 636; now 18 U.S.C. § 3185), and this was sustained in *Neely v. Henkel*, 180 U.S. 109, where the accused was required to stand trial before an American military commission sitting in occupied Cuba.

Furthermore, military jurisdiction over a civilian employee who escaped to the United States from occupied Germany was sustained in a situation that involved, in substance, a forced extradition. *United States ex rel Mobley v. Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904.

Consequently, if the trial of civilians by court martial is sustainable on the grounds set forth in the Court's opinion in the present cases last June, then Toth was, as a constitutional matter, also amenable to military jurisdiction notwithstanding his return to this country and his reacquired civilian status here.

It makes no difference how the cases are viewed, the result is always the same. In its essentials, in its substance, the holding of *Toth v. Quarles*, 350 U.S. 11, cannot be reconciled with the basis for and the reasoning of the opinions in these cases last June.

IV. AS LONG AS THE OBJECT SOUGHT TO BE ATTAINED IS THE PUNISHMENT OF CRIME RATHER THAN MILITARY CONTROL OF CIVILIANS, PRACTICAL ALTERNATIVES ARE AVAILABLE

In response to the Court's first question as to "The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas" (352 U.S. 901), the Government has presented an

elaborate argument buttressed by communications from interested overseas commanders (U.S. Supp. Br. 21-63, 97-129). It is our position that the question under consideration in the present cases, which concerns the scope of the Bill of Rights, is not one that can be resolved by an examination of practical necessities, that the materials adduced are in any event demonstrably inadequate as a basis for judgment, and that the Government has failed alike to suggest the obvious solution in the case of civilian employees or to disclose the true legal position with respect to the civilian dependents.

A. These Are Not Cases Involving Questions of Substantive Due Process Where "Practical Necessities" Are Relevant to Measure Constitutionality, and the Materials Adduced Are Moreover Not of a Nature That Can Safely Be Relied Upon as a Foundation for Judicial Action.

The basic fallacy underlying the Government's arguments based on the "practical necessities" is the assumption that the use of courts-martial to try civilians overseas is a simple matter of legislative judgment requiring only a showing that the judgment is a reasonable one (U.S. Supp. Br. 3, 4, 40, 82). That assumption mistakes the nature of the problem.

The question here is not one of substantive due process, whether a particular exertion of regulatory power bears a reasonable relation to a legitimate legislative end. Nor is the question presented one of the limits of due process in a national emergency. E.g., *Wilson* v. *New*, 243 U.S. 332; *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398; *Hirabayashi* v. *United States*, 320 U.S. 81; *Korematsu* v. *United States*, 323 U.S. 214. It is rather one of ascertaining the location of the constitutional boundary between trial by jury and trial by court-martial, a field wherein there is simply no scope for legislative judgment. That matter has been placed beyond the competence of the legislature by the Constitution itself.

To argue, as the Government does (U. S. Supp. Br. 29-30), that "The decision whether civilians overseas are a necessary part of our armed forces and whether practical necessity requires that they be subject to military authority is primarily one for the executive and legislative branches of our government," seems to us nothing more than an expression of contempt for the very concept of the Bill of Rights and for the functions of this Court in defining and enforcing its guarantees.

The distinction between the two inquiries is well illustrated by the many cases involving State criminal procedure. It is reasonable, and hence consistent with the Due Process Clause of the Fourteenth Amendment, for a State to substitute information for indictment (*Hurtado* v. *California*, 110 U.S. 516), to provide for a jury of less than 12 in criminal cases (*Maxwell* v. *Dow*, 176 U.S. 581) or to provide for a majority verdict in such cases (*Jordan* v. *Massachusetts*, 225 U.S. 167, 176), to permit the prosecution to comment on the defendant's failure to testify (*Twining* v. *New Jersey*, 211 U.S. 78; *Adamson* v. *California*, 332 U.S. 46), to grant the prosecution an appeal in criminal cases (*Palko* v. *Connecticut*, 302 U.S. 319), to substitute new concepts of double jeopardy (*Brock* v. *North Carolina*, 344 U.S. 424), and to permit the use of illegally obtained evidence (*Wolf* v. *Colorado*, 338 U.S. 25). But the very reasonableness that saves the particular rule of State law when assailed as being violative of Due Process is utterly unavailing when put forward as a reason for permitting similar action under Federal law, for the obvious reason that all action by the United States is subject to the express and specific limitations of the Bill of Rights.

Consequently, when inquiry is made into the legality of Federal action as against Bill of Rights safeguards and guarantees that are in question, resort must be had, not to conceptions of reasonableness in the abstract, but to

historical materials, the rules of the common law, the understanding of the Founders, and the administrative construction over the years. This was the course pursued in *Ex parte Quirin*, 317 U.S. 1, in ascertaining whether the saboteurs were properly tried by a military commission. This was also the course pursued in *District of Columbia* v. *Colts*, 282 U.S. 63, and in *District of Columbia* v. *Clawans*, 300 U.S. 617, in determining what kinds of offenses were petty in the constitutional sense so as to be triable without a jury. This was similarly the direction and nature of the inquiry in *United States* v. *Wood*, 299 U.S. 123, where it was held that Government employees were proper jurors in a criminal trial. Indeed, it was on the basis of the historical materials adduced by the Government in that case (No. 34, Oct. T. 1936) that the Court disapproved its earlier contrary holding in *Crawford* v. *United States*, 212 U.S. 183.

Plainly, the latter question could not be resolved by asking the United States Attorney for the District of Columbia whether the "practical necessities" of law enforcement in that jurisdiction required the use of Government employees as jurors. The determining factor in the *Wood* case was that, as the Government's researches into the precedents from the days of black letter folios in Law French showed, King's servants were not *per se* ineligible to be jurors as a matter of common law.

Nor can the issues now involved be decided by assertions, variously phrased (U.S. Supp. Br. 6, 22-33), that the overseas military commander's powers and authority must be commensurate with his responsibilities. For if his responsibilities, which plainly stem from international agreements, are greater than the powers he is granted or can exercise under the Constitution, this kind of argument resolves itself into the inadmissible contention (*supra*, pp. 26-29) that a treaty or other agreement can override specific constitutional guarantees.

But even if these cases were deemed, for purposes of argument, appropriate for resort to extra-judicial sources, it is plain that the materials presented do not measure up to the standard of trustworthiness that has attached to those which the Court has considered in the past.

Unlike the kind of reports that Mr. Louis D. Brandeis brought to the attention of the Court through his famous brief in *Muller* v. *Oregon*, 208 U.S. 412, 419-420, reports which could qualify as "matters of general knowledge" and so come within the realm of judicial notice, the letters exhibited in these cases represent simply expressions by those whose powers are involved. And whereas foreign legislation such as that considered in the *Muller* case was plainly relevant to the issue of reasonableness, foreign military legislation from countries not having our constitutional limitations is, as has been held, unavailing here. *Toth* v. *Quarles*, 350 U.S. 11 (see the foreign statutes cited at 29-31, note 11); *United States* v. *Cooke*, 336 U.S. 210 (see the British statutes cited at Resp. Br. 13, n. 4, No. 231, Oct. T. 1948).

But the letters brought forward in the present case are subject to other infirmities also. They are *ex parte*, and, as will be pointed out below in detail, they bristle with points that are left in doubt or else not covered at all, points on which cross-examination would have elicited pertinent information. In the last case before this Court where it was sought to establish military necessity as a justification (*Duncan* v. *Kahanamoku*, 327 U.S. 304), the Government did not resort to letters in its appellate briefs, but instead produced its military witnesses at the habeas corpus hearing in the District Court, where they were of course subject to cross-examination (No. 14, Oct. T. 1945, R. 1066-1078; No. 15, *id.*, R. 55-56, 241-301).

Moreover, the letters now pressed on the Court as determinative of the contested issue are, all too obviously, *post motam litem*; their approach is keynoted by the first

sentence of the first letter printed (U.S. Supp. Br. 28): "The news that the United States Supreme Court has agreed to reconsider the question of the amenability to military law of dependents accompanying military personnel overseas is most disturbing." No doubt similar communications could be obtained from lawyers, constitutional scholars, and, for that matter, from dependent wives overseas, to the effect that last June's decisions were even more disturbing. But we hardly think that such a course of counter-picketing the inside of the courthouse—outside picketing having already been banned by 18 U.S.C. § 1507 and 40 U.S.C. §§ 13f-13p—would be in any degree helpful.

The short of the matter is that the materials now brought forward are not adapted for use as a basis on which to found judgment. And in no case of which we are aware, including those where, unlike the present ones, the extrajudicial materials have been relevant to the issues under consideration, has the Court rested its decision on the obviously self-serving statements of the very officers whose powers were being challenged.

B. If, as the Government Contends, There is an Impelling Military Reason Why Overseas Commanders Must Command, Control, and Punish Civilian Employees, Then the Obvious Solution, Which is Plainly Constitutional and Which Has Not Been Shown to be Impractical, is to Employ Only Military Personnel for Overseas Military Duties.

The Government argues at length the need for overseas commanders to control civilian employees, and to try by court martial any who offend; and stress is laid on the circumstance that it is unfair to try a soldier by one law and the civilian working next to him by another. (U.S. Supp. Br. 29-30, 35).

But the arguments made and the letters from overseas commanders that are produced are alike silent on what plainly are controlling factors:

First, What military reason is there why civilians must be employed in military work overseas?

Second, What military reason prevents overseas duty assignments from being reserved for military personnel, whose discipline raises no constitutional question?

We will show, from authoritative sources, that the compelling reason for the present proliferation of civilians within military installations, both at home and abroad, is not in any sense military, but is purely budgetary. We will similarly show that the supposed disciplinary considerations that are put forward in respect of security considerations and military orders, violation of which does not constitute any offense against either foreign law or against the general American criminal law, break down in view of the more than 250,000 non-American civilians currently employed by the Department of Defense abroad. Finally, we show that the Government's data fail to establish even the impracticability of obtaining military personnel to perform the tasks now carried on by civilians.

First. It is a demonstrable fact, though assuredly it cannot be inferred from any of the *ex parte* materials now adduced by the Government, that the reason why so many civilian employees are now accompanying the armed forces abroad is purely budgetary.

In 1954, the House Committee on Appropriations told the Army (H. R. Rep. 1545, 83d Cong., 2d sess., p. 16), that "one obvious alternative to military manpower is the use of more civilians whose annual cost is considerably less, on the average, than that of the man in uniform."

Sec. 720 of the Defense Appropriation Act of that year (Act of June 30, 1954, c. 432, 68 Stat. 337, 358), therefore authorized the substitution of civilian for military personnel "whenever, in the opinion of the Secretary of the Military Department concerned, the direct substitution of civilian personnel for an equivalent or greater number of

military personnel will result in economy without adverse effect upon national defense * * *."

Accordingly, the Army undertook the process of substituting 11,888 civilians for 12,495 military personnel under the title "Operation Teammate." See *Department of the Army Appropriations for 1956*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st sess., pp. 4, 74, 296-297, 459-463, 1124-1126. As expressed by Brig. Gen. Westmoreland of the Personnel Division of the Army's General Staff (*id.*, pp. 459, 1125):

> "In general terms, this policy provides for the maximum use of civilian personnel in all positions which do not require military skills or military incumbents for reasons of training, security, or discipline.
>
> * * * * *
>
> "What we are doing is changing the composition of our military-civilian work force by increasing the percentage of civilians."

An official comment on Operation Teammate (*Army Information Digest*, Vol. 10, No. 4 (April 1955), p. 47) was that "The program will permit the Army to retain in service a number of combat units which otherwise would have been inactivated due to reduced personnel ceilings."

In the following year, Congress was advised of the savings effected by Operation Teammate. *Department of the Army Appropriations for 1957*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 2d sess., pp. 156, 316 *et seq.*, and see particularly the chart at 318 showing actual savings.

2. In this connection, it is an historical fact that "The Navy's Construction Battalions, popularly known as the Seabees, were established to meet the wartime need for uniformed men to perform construction work in combat

areas." 1 *Building the Navy's Bases in World War II. History of the Bureau of Yards and Docks and the Civil Engineer Corps, 1940-1946* (1947) 133. It was found that, when war came, contractors' employees who were civilians not only lacked the training necessary to defend themselves, but could not consistently with international law bear arms against the enemy. *Id.*

3. If, therefore, civilian employees cannot be tried by court-martial and thus subjected to military control in the degree thought necessary by the overseas commanders, it is plain that these employees' positions do require "military incumbents for reasons of * * * discipline" (Gen Westmoreland, *supra*, p. 144), and that civilians cannot be substituted for such military incumbents "without adverse effect upon national defense" (Sec. 720 of the Act of June 30, 1954, *supra*, pp. 143-144).

Second. The Government argues at length (U.S. Supp. Br. 57-61) that "As to offenses which are not crimes under the law of the foreign state, but are crimes only under American military law, the alternative to court martial jurisdiction is no trial at all." But that argument is marked by two significant omissions.

1. The Government does not disclose what is the fact, that the Department of Defense presently employs 76,514 non-American civilians in foreign countries, and that it contracts with foreign governments for the services of 275,640 additional non-American civilians, who remain employees of those governments, which in turn receive reimbursement for such services from the United States. See U.S. Civil Service Commission, *Federal Employment Statistics Bulletin*, October 1956, p. 9; see also 103 Cong. Rec. 617 (daily ed., Jan. 17, 1957).

Thus over 350,000 non-American civilians are permitted to overrun our foreign military installations, individuals who can by no stretch of law or imagination be subjected to trial by an American court-martial.

The Government nowhere explains why security and discipline will break down for want of power to court martial the 23,000 American civilians whose misdeeds do not involve a violation of foreign law, while at the same time both are secure against the propensities and proclivities of 350,000 foreigners.

2. Nor does the Government explain why every military commander in the United States is not similarly faced with the problem of civilian employees on his installation whose acts (U.S. Supp. Br. 59) "are not now offenses under the general criminal laws of the United States." Here again, we submit, the attempt to assert the overseas civilians into a military status fails on still another score.

Third: What is said by the Government as to the type of occupations performed by civilians with the Army overseas is so incomplete that it affords no real understanding of the problem.

Thus, it is said that the armed forces require the services of civilian technicians (U.S. Supp. Br. 24, 37, 40) and that some 23,000 American citizen-employees are now in foreign countries (*id.* 23), and it is said (*id.* 37) that "civilian technicians are an integral part of a larger ship's complement."

No breakdown as to the occupation of the 23,000 civilian employees is vouchsafed, and nothing is offered to show whether the majority of these individuals are highly skilled technicians—or are merely clerks, stenographers, mechanics, and post-exchange stewards.

We know that a number of the civilians tried by court martial overseas have been mere merchant seamen. E.g., *United States* v. *Garcia*, 5 USCMA 88, 17 CMR 88; *United States* v. *Robertson*, 5 USCMA 806, 19 CMR 102. One such accused was a civilian manager of "The Landing Strip Civilian Club." See *United States* v. *Rubenstein*, 19 CMR 709, 729, affirmed, USCMA, Jan. 25, 1957; *Ruben-*

stein v. *Wilson*, 212 F. 2d 631, 632 (D. C. Cir.). And it appears from the records of the Iceland command (U.S. Supp. Br. 130-131) that many of the civilians there subjected to military trials have been contractors' employees and thus not employees of the Government at all.

With respect to the composition of the civilian work force, we cannot point to any published documents, but we have made inquiries of individuals who have knowledge of the facts. It is accordingly our information, first, that by far the bulk of the 23,000 civilian employees in question occupy essentially clerical or minor managerial positions, most of them in the lower civil service grades, and that only a very small percentage are technicians in the upper grades who are skilled in essential specialities; and, second, that no Navy ship has any civilians as an integral part of its complement, and that the only civilians who ever sail on such vessels are employees of the concerns installing technical equipment who are on board for only a few voyages to train naval personnel in the use of such equipment.

In any event, the materials adduced by the Government are far from establishing that the civilian employees overseas are in fact preponderantly in the technician rather than in the clerical or mechanical class. And if it is in fact impossible to obtain for voluntary military service the few really skilled technicians that the armed forces require, then such persons can be drafted just as doctors are. Doctors are being drafted and have been required to serve in sub-professional capacities (*Orloff* v. *Willoughby*, 345 U.S. 83), although the Surgeon General has long had authority to employ unlimited numbers of contract surgeons in an emergency (10 U.S.C. § 4022(a) [1956 revision]). Whether the Doctors' Draft Act is "controversial" (U.S. Supp. Br. 37) cannot, of course, be answered with a flat Yes or No, but at any rate that law raises no constitutional question.

Fourth. In short, if, as the overseas commanders insist, they must have power to subject civilian employees to military law and discipline,[39] then the obvious and plainly constitutional method is to refrain from sending such civilians overseas, and to rely solely upon uniformed personnel to do whatever work is necessary at overseas military installations.

Thus the argument based on "practical necessities" that is so eloquently and indeed so vehemently presented comes only to this, that in order to economize on the difference between the expense involved in hiring 23,000 civilian employees, and that connected with recruiting or drafting the same number of military personnel, it is imperative to violate the Constitution by subjecting civilians to military law.

The values inherent in the Bill of Rights can not thus be measured by showing how many dollars might be saved by dispensing with its constitutional protections. And we submit that it is more than a little disturbing, at the very least, that there is shown to be such a thoroughgoing divergence between the justification presented to Congress for the presence of civilian employees overseas, and the justification for the same practice that is now presented to this Court.

---

[39] It is relevant to point out that neither Admiral Good (U. S. Supp. Br. 115-120) nor Captain Walker (*id.*, 120-129) undertakes to explain how the Navy successfully operated its base at Guantanamo Bay for so many years without any similar powers (*supra*, pp. 62-63).

C. There Is No Showing That the Incidence of Crime on the Part of Civilian Dependents (as Distinguished From Civilian Employees) is a Problem of Any Magnitude, and Moreover the United States Under the NATO and NATO Type Agreements Has Yielded Primary Jurisdiction to the Receiving States Over All Criminal Offenses Committed by Dependents.

The practical solution for the problem of controlling civilian employees being to rely only on military personnel, we turn to the case of the civilian dependents who, we agree with the Government (U.S. Supp. Br. 30, [illegible]), cannot be militarized.

First. How much of a problem is presented by the possible criminal proclivities of civilian dependents? The figures of court martial trials of civilians that the Government has furnished (U.S. Supp. Br. 30-31) are not divided into civilian employees and civilian dependents, and to that extent are not meaningful in the present connection.

We venture to suggest that there have been very few trials of civilian dependents, and that there will never be occasion for many. In Iceland there were none over a four year period (U.S. Supp. Br. 130-131). Lt. Gen. Clarke, commanding the U. S. Seventh Army, admits (*id.* 130) that "court-martial cases involving civilian dependents are comparatively rare." We know that, from 1775 to 1950, the U. S. Army never tried a dependent wife, and that the first such trials took place in occupied territory where general courts-martial had the powers of military government courts (Covert Br. 64-65). And out of 9,620 cases docketed in the Court of Military Appeals through January 31, 1957, only four involved civilian dependents. This is only a little over 4/100 of one per cent. Two of those cases are now here; the third was that of Mrs. Brillhart, the Englishwoman tried in Eritrea who had to be paroled into this country to enter prison (Covert Br. 96-97; *supra*, pp. 25-26); and the fourth was Mrs. St. Clair

supra, pp. 101-102), whose sentence had been remitted by the time her case came before the Court of Military Appeals (No. 7760).

Plainly, this problem is not one of such magnitude that the Constitution must be wrenched and rewritten in order to meet it. But if wives can be tried by court-martial, so can children. The Uniform Code is plainly not adapted to the exercise of a juvenile jurisdiction; we pointed out why, in some detail (Covert Br. 89-90), and the Government, for reasons that seem only too plain, has not ventured disagreement on that score.

Second. The Government urges (U.S. Supp. Br. 41) that the matter should be "considered in terms of the present treaties [rather] than in terms of the interim arrangements * * * under which jurisdiction of the defendants in these cases was obtained."

We entirely agree, and we think it essential to point out that *under the present treaties the United States has already conceded to the receiving states primary jurisdiction over all crimes committed by civilian dependents.* The Government does not disclose this significant fact, which can easily be established.

1. By Art. I (1)(b) of the NATO Status of Forces Agreement (U.S. Reply Br. 32), "civilian component" means a civilian in the employ of an armed service, while Art. I (1)(c) defines "dependent" as the spouse or child of a member of an armed service or of a civilian component (*id.*).

Art. VII (3)(a) and VII (3)(b), set out at U.S. Reply Br. 36-37, provide as follows:

> "3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> "(*a*) The military authorities of the sending State shall have the primary right to exercise jurisdiction

over a member of a force or of a civilian component in relation to

"(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

"(ii) offences arising out of any act or omission done in the performance of official duty.

"(*b*) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction."

Thus, in relation to offenses committed by dependents, the receiving state has primary jurisdiction; the matter is perfectly clear from the explicit terms of the Treaty.[40] It is really amazing that Government counsel fail to disclose this significant circumstance to the Court.

A recent study by two disinterested scholars (Snee and Pye, *A Report on the Actual Operation of Article VII of the Status of Forces Agreement* (Georgetown Univ. Law Center, 1956) 43) calls attention to a similar oversight by American authorities abroad:

"The problem of interpretation of this paragraph arises from the omission of the term 'dependent' when paragraph 3(a) lists those over whom the sending state will have the primary right to exercise jurisdiction. As a matter of law, it would appear that the receiving state has the primary right to exercise primary jurisdiction, or exclusive jurisdiction in all cases where an offense is committed by a dependent. If the treaty is thus interpreted, we have the anomaly that if a soldier shoots his American wife, the United States has the primary right to exercise jurisdiction; while if the wife shoots her soldier husband, the receiving state has the primary right.

[40] The same provisions are now applicable in Japan. See Par. 3, Amendment of Article XVII of The Administrative Agreement with Japan, TIAS 2648, 4 U.S. Treaties 1846, 1848.

"The same problem arises in the interpretation of paragraph 5 of Article VII. This provides that the authorities of the two states shall assist each other in the arrest of dependents in the first section of the paragraph. It does not, however, in the last section, allow dependents in the custody of the sending state to be retained in that custody until charged by the receiving state.

"Some military authorities have as a matter of course considered dependents to be covered by the provisions of these articles, and in at least one country (Italy) we have seen reference to an Agreement prior to SOFA in which dependents are put on an equal footing with members of a force. In any event, we have seen no case in which foreign authorities claimed or American authorities admitted any distinction between dependents and members of the force in this regard. Whether the distinction in the provisions of Article VII was intentional or due to faulty draftsmanship cannot be determined by us without first having access to the working papers of the Agreement."

It may well be that the precedent for Art. VII of the NATO Treaty was the 1943 agreement with Egypt, which did not extend to dependents the immunities granted members of the forces. See pp. 75-76, *supra*. But, at any rate, regardless of the reason for the distinction, the plain terms of the NATO Treaty render completely irrelevant the present strictures directed at foreign trials and possible foreign imprisonment (U.S. Supp. Br. 33-34, 54-57). Those objections should have been voiced to the persons who negotiated the NATO Agreement on behalf of the United States.[41]

In this connection, it seems proper to point out once more (Covert Br. 106) that the arguments against foreign

[41] Those considerations should also be examined in the light of the case of Mrs. Brillhart, the British national tried by U. S. Army court-martial in Eritrea and now undergoing a sentence of life imprisonment at Alderson, W. Va., Covert Br. 96-97; *supra*, pp. 25-26.

trials that are now presented are considerably at variance with the extensive testimony given in the summer of 1955, by representatives of the Departments of State, Defense, and Justice, to the effect that the relinquishment of jurisdiction over Americans to the courts of the NATO countries was working satisfactorily. See *Status of Forces Agreements*, Hearings before the House Committee on Foreign Affairs, 84th Cong., 1st sess., on H. J. Res. 309 and similar measures, pp. 169-374.

Third. The problem of possible criminal acts by civilian dependents is, in view of their infrequent occurrence, essentially on a par with the problem of possible criminal acts committed by American diplomats abroad; and the latter has also been dealt with on a footing of waiver. No statute of the United States makes punishable a homicide committed by a member of the American diplomatic service in the country to which he is accredited, and his complete immunity from local process precludes his being punished under foreign law. But the situation arises so infrequently that, in the one instance of which we are aware, the United States cut the jurisdictional knot by the simple expedient of waiving the offender's immunity. See *Tyler Gatewood Kent*, 28 Cr. App. R. 23; *Ex parte Kent*, 323 U.S. 672; *A Report on the Case of Tyler Kent*, 11 Dept. of State Bull. 243.

Kent's crime was a security offense, the pilfering of classified documents from the American Embassy in London. The American authorities, *non constat*, the supposed considerations advanced at U.S. Supp. Br. 33, were perfectly content to let the British punish that security violation as a matter of British law.

D. Ample Practical Means Are Available to Punish Crimes Committed Abroad by Civilian Dependents of American Servicemen.

Let us suppose that, under existing treaty arrangements, an American woman kills her serviceman husband in a

NATO country, or in Japan where the same arrangements prevail.

First. Under those arrangements, as Art. VII (3) shows (*supra*, pp. 150-152), the authorities of the receiving state have primary jurisdiction.

Second. If, as we believe, such a civilian dependent cannot constitutionally be tried by court martial, legislation is necessary to make her triable in a United States court. But the obvious means is to make the offense triable in the same manner as any other offense committed abroad that Congress has declared criminal, viz., in the first district into which the offender is brought. 18 U.S.C. § 3238. This was, indeed, the precise suggestion made by Judge Tamm in the *Covert* case below (R. 132, No. 701).

To urge, as the Government seems to do (U.S. Supp. Br. 48), that this might "conflict with the venue provisions of the Sixth Amendment," is to overlook the provision of Art. III, Sec. 2, that "when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed," and to overlook as well the host of successful prosecutions in this country for treason committed abroad. Covert Br. 83, 104.

Certainly in today's air age, it is far simpler to provide for trial in the United States of an offense committed abroad than it ever was previously. Eight months elapsed between the killing and the trial in *United States* v. *Wiltberger*, 5 Wheat. 76; see *supra*, p. 18. In *United States* v. *Maro*, 27 F. 2d 518 (C.A. 3), the victim was struck in August 1924 and died in October 1924, yet the indictment against his assailant was not found until September 1926. See Brief for the Appellee in the *Flores* case, No. 567, Oct. T. 1932, pp. 37-39. And in *Flores* itself, the crime was committed in February 1930 but the indictment was not returned until September 1931. R. 2, No. 567, Oct. T. 1932.

The Air Force, which can now circumnavigate the globe in a mere 45 hours (*Washington Post*, Jan. 19, 1956, p. 1), should be at least equally resourceful in promptly bringing an accused overseas dependent into a constitutional forum.

Third. But it is said that justice must be prompt to be effective and that foreign witnesses cannot be subpoenaed (U.S. Supp. Br. 35). Neither objection carries the ring of conviction.

From date of act to date of final affirmance took over twenty-six months in the case of Mrs. Smith (Oct. 4, 1952, to Dec. 30, 1954; R. 1-2, 7, 52, No. 713); and the elapsed time from date of act to the decision of the Court of Military Appeals in Mrs. Covert's case was over twenty-seven months (Mar. 11, 1953, to June 24, 1955; R. 1, 97, No. 704). As long as military trials are governed by the standards of the UCMJ in preference to those of the 1917 Houston riot (*supra*, pp. 112-113), any talk about the deterrent effect of speedy justice as a reason for preferring a military to a civilian trial is just that: talk.

And in view of the facility with which the Government has consistently persuaded foreign witnesses to come to this country (Covert Br. 194), it is similarly only talk to conjure up the difficulty of securing their testimony.

Fourth. It is argued (U.S. Supp. Br. 46-47) that foreign countries will not permit persons in the situation of these two women to be returned to the United States for trial there. But as long as the victim was not a national of the receiving state, it is difficult to imagine that any foreign country friendly enough to want or permit American troops on its soil in time of peace is going to insist on trying an American woman in its own courts for an offense against an American national.

Fifth. Whether the foreign state would permit the establishment on its own soil of a United States court raises quite a number of problems.

There may well be opposition, as the Government argues (U.S. Supp. Br. 49-54), in countries but recently freed from the yoke of capitulations. But the British, who are perhaps as sensitive to any impingement upon their exclusive sovereignty and jurisdiction within their own domain as any people in the world, and who were at pains not to grant to American troops at the leased Atlantic bases complete immunity from the local criminal law (*supra*, p. 76), none the less did not shrink from the presence of an American court at those bases. Such a tribunal was clearly contemplated; here is Art. IV (4) of the Base Lease Agreement of March 27, 1941 (55 Stat. 1560, 1562):

> "(4) When the United States exercises jurisdiction under this Article and the person charged is a British subject, he shall be tried by a United States court sitting in a Leased Area in the Territory."

It is to be noted, also, that the concept of an American court abroad for the trial solely of civilian dependents of the armed forces does not involve a return to the capitulatory scheme of universal extraterritoriality, and that, from the point of view of the receiving state, there is really very little difference, either as a matter of law or of national pride, whether the American tribunal that sits there to try an American dependent for an offense against another American is a court-martial or a civilian court.

There is also a very real question whether the doctrine of *In re Ross*, 140 U.S. 453, viewed in the light of its only supportable basis (*supra*, pp. 69-70), would extend far enough to justify the creation of a consular or other non-jury civilian tribunal. But in view of the limited scope of the problem, we think that return to the United States for trial here of all serious offenses would doubtless constitute a less doubtful solution.

Sixth. So far as minor offenses by dependents are concerned, the deterrent effect of the threat of sending the offenders home would seem to be adequate. Certainly if Mrs. Smith can be threatened, as she was (R. 20, No. 713), with such a course as the consequence of requiring further hospitalization, it hardly lies in the Government's mouth to urge that petty offenders against police regulations cannot be similarly handled. That course was the traditional method of dealing with camp followers who were not amenable to military law. See Lee, *The Judge Advocate's Vade Mecum* (Richmond, 1863) § 22:

> "Where offences of a purely military character are committed by such persons, such as insolence to a commissioned officer, disobedience, or neglect of duty, though a court martial could not take cognizance of them, the offender may, nevertheless, be frequently sufficiently punished by dismissal from the camp . . ."

Seventh. Of course, as the Government quite properly states (U.S. Supp. Br. 41-42), the arrangements that can be made with foreign nations do not lie within American control. But since the United States has seen fit to concede primary jurisdiction over civilian dependents to the receiving state under the NATO Treaty, and must obtain a waiver to try such persons at all, the question is simply how that waived jurisdiction is to be exercised. That is a problem which, very obviously, has never been explored. That is a problem which, to judge from the Supplemental Brief, the Government is reluctant to explore. That brief renders all too obvious the Government's disinclination to seek a constitutional solution.

E. There Is No Constitutional Difference Between Civilian Employees and Civilian Dependents in Time of Peace.

On the third question put by the Court (352 U.S. at 902), whether there is any constitutional distinction between civilian employees and civilian dependents "for purposes

of court martial jurisdiction over civilians overseas in time of peace," to which the Government has answered (U.S. Supp. Br. 37-39) that there is none, we find ourselves in agreement with the conclusion, but for wholly different reasons.

The Government argues (*id.*) that all soldiers, employees, dependents must be treated alike because all are an integral part of the overseas force. While of course we cannot concur in this blurring of constitutional boundaries by mere assertion, no matter how variously repeated, we feel constrained by the authorities to agree that, since the determinative factor in time of peace is status, the functional aspect of the civilian employees must be deemed legally irrelevant.

It is true that, traditionally, the only civilians subject to military law even "in the field" were functionally connected with the forces. Winthrop, *1445 (reprint, p. 106); *supra*, p. 55. It is also true that, through 1945 and until 1950, no civilian dependent was ever tried by court martial. Covert Br. 61-65. And, in sharp contrast to the Government's present contentions, the Solicitor General only five years ago told the Court in *Madsen v. Kinsella* (U.S. Br., No. 411, Oct. T. 1951, p. 51) that

> "The compelling reasons of policy which preclude subjecting soldiers of the occupying forces to the law and tribunals of the occupied territory have much less weight when applied to civilians of the occupying power, particularly those, such as soldiers' dependents, who bear no functional relationship to the occupying troops."

Just what has occasioned such a complete about-face since then is, understandingly enough, nowhere sought to be explained. But under the authorities already discussed at length (Covert Br. 36-91; *supra*, pp. 31-54), it is plain that, in time of peace, military jurisdiction depends on status, and that, as in the case of the post trader (Covert

Br. 45-47), even full functional connection with the forces is ineffective to subject a civilian to military law.

There remains, of course, the practical distinction already discussed: The functions now performed by the civilian employees, who commit the vast majority of offenses, can be turned over to military personnel who are subject alike to military command and military law. The civilian dependents, who cannot be militarized, are not shown to be a major crime problem.

F. There Is No Constitutional Distinction, With Respect to Court-Martial Jurisdiction, Between Major Crimes and Petty Offenses.

On the fourth question posed by the Court (352 U.S. at 902), "The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses," we also agree with the Government (U.S. Supp. Br. 82-95) that there is no relevant distinction, though again for different reasons.

We deem it unnecessary to embark on any detailed discussion of the power to try petty offenders by a civilian judge without a jury (U.S. Supp. Br. 83-88), nor to cite *O'Donoghue* v. *United States*, 289 U.S. 516, to correct the Government's strange assumption (U.S. Supp. Br. 86, 88) that Article III is somehow not applicable in the District of Columbia, essentially for the reason that, in our view, civilian dependents cannot be tried by court-martial at all in time of peace since such a tribunal cannot be given any power over them. We have already sufficiently elaborated the reasons for that conclusion.

The difference between major crimes and petty offenses committed by civilian dependents is essentially a practical one.

First. The basic background fact is that the United States has conceded primary jurisdiction over all offenses by dependents to the receiving state.

Second. For such few offenses as the civilian dependents commit, the obvious solution is to provide for trial in a United States court in the first district to which the major offender is brought, and to use the threat of being sent home to deter petty offenders.

Third. There is talk (U.S. Supp. Br. 57-61) about offenses which are not crimes by the law of the receiving state and which are not civilian crimes by Act of Congress but offend only against military orders. But until the Government can point out, as it assuredly does not do anywhere in the 133 pages of its Supplemental Brief, how a similiar situation is dealt with at military installations in the United States, or why a similar situation does not arise there, or how it handles possible security violations by over 350,000 indigenous civilians working at American military bases abroad (*supra*, p. 145), it does not seem necessary to dwell on that situation.

V. IN ANY EVENT, MRS. COVERT CANNOT NOW BE TRIED BY COURT-MARTIAL IN THE DISTRICT OF COLUMBIA

In its *Krueger* opinion last June, the Court noted (351 U.S. at 480) "that this case presents no problem of the jurisdiction of a military court-martial sitting within the territorial limits of the United States * * *." In the *Covert* case, however, where the Air Force proposes to retry a civilian woman by court-martial at Bolling Air Force Base within the District of Columbia, that problem is squarely presented; and it was duly saved in the Petition for Rehearing, pp. 8-10.

It is Mrs. Covert's position that, whatever the ultimate decision as to court-martial jurisdiction over her while she was in England as a person "accompanying the armed forces of the United States without the continental limits

of the United States" (Art. 2(11), U.C.M.J.), such jurisdiction ceased when she was returned to the United States by the Government and was there placed in civilian custody.

A. The Military Rule Has Always Been That Military Jurisdiction Ceases When Military Status Is Terminated by Affirmative Act of the Government.

In the *Covert* case, the Court last June said (351 U.S. at 492), "We hold only that military jurisdiction, once validly attached, continues until final disposition of the case."

That holding makes the Court more militarist than the military, for the military rulings, for more than ninety years prior to 1956, have never gone that far.

By way of preliminary, it should be pointed out that no disagreement is—or can be—expressed with the holding (351 U.S. at 491) that a rehearing is simply a continuation of the original proceeding. That proposition has never been questioned, and indeed was conceded at the hearing in the District Court. Tr. 10, quoted at Covert Br. 27, note 14.

By way of further preliminary, Mrs. Covert has likewise conceded that military jurisdiction is not lost where, pending trial or in the course of the proceedings, the soldier's term of enlistment expires, or the officer's tour of active duty ceases, or the officer's commission is terminated by operation of law. See Covert Br. 22, where the authorities are collected. Nor does Mrs. Covert contest the doctrine that a unilateral act of escape is insufficient to end military amenability. *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904, discussed at Covert Br. 26.

The present case, however, differs completely from all of the foregoing. What is here involved is an affirmative

act on the part of the Government that terminated the accused's military status. On that point, the military rulings have been unanimous since 1862. Any such affirmative act, at any stage of the proceedings, destroys military jurisdiction. See Covert Br. 23-25, where the authorities are collected and discussed.

Thus, an officer's release from active duty during the process of appellate review and before his sentence to dismissal has been confirmed (see pp. 84-85, *supra*, for the need of final executive action in such cases), terminates military jurisdiction and abates the proceedings. *United States* v. *2d Lt. Edwin R. Murray*, 62 BR 35; 5 Bull. JAG 278, ¶407(3), set forth at Covert Br. 24.

Similarly, in *United States* v. *Sippel*, 4 USCMA 50, 53, 15 CMR 50, 53, the Air Force proceeded on the basis that any administrative action directed at an officer whose commission had expired by operation of law might abate the pending appellate proceedings in its case, and accordingly took none. See discussion at Covert Br. 25.

Likewise, when court-martial jurisdiction over civilians was still limited by the statute to a particular period of time, viz., to a time of war, it was consistently held that "the jurisdiction, to be lawfully exercised, must be exercised *during* the *status belli*." Citations at Covert Br. 35. And where the offense—spying—was one that could only be committed in time of war, it was held that the trial could not take place after the war was over. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

So here, where the military jurisdiction was limited geographically, and where the Government assuredly does not contend that Mrs. Covert could be tried by court-martial as a member of the land and naval forces if her offense had originally been committed at Bolling Field; it is her position that the Government terminated any possibility of retrying her by court-martial, when, by its own

act, it brought her back to the United States. Once returned, she was no longer accompanying the armed forces "without the territorial limits of the United States." Once returned, she was in the United States and came squarely within the guarantees of Article III, Section 2, and of the Sixth Amendment.

To this the Government replies (U.S. Memo. 13), "The clear answer is that when the military services discharge, release, or muster out a member they demonstrate a definitive intention no longer to assert jurisdiction over him."

But the fallacy in the foregoing is the injection of a subjective element into what is entirely an objective matter. The military services are aggregations of many individuals and so can have no collective intent. Moreover, discharges are silent on intent. Certainly the officer who separated Lt. Murray (*supra*, p. 162) did not intend to make impossible the execution of that individual's dismissal; but the separation had that necessary consequence. So, in *United States* v. *Cooke*, 336 U.S. 210, the officer who discharged Hirshberg at the Brooklyn Navy Yard (R. 41, 127, 145; No. 231, Oct. T. 1948) certainly did not intend thereby to free that person from amenability to trial for his as yet undiscovered misdeeds, and the same may be assumed of the officer who gave Toth an honorable discharge. In both cases, however, the discharges necessarily effected those results, which, it may be ventured with certainty, were not results that anyone intended.

Where, as in the *Sippel* case (*supra*, p. 162) there is a genuine intention to retain jurisdiction, that intention can only be effectuated by refraining from doing the acts from which loss of jurisdiction flows.

Consequently, when the Air Force took Mrs. Covert out of an Art. 2(11) area and brought her back to the United States, its intention—if indeed it could be said to be

capable of an intention, or if any individual actually gave the matter any thought, which is more than doubtful, its intention, if any was immaterial. What was determinative was the circumstance that the Government by its own affirmative act removed her from the area where alone (under the present assumption) there was military jurisdiction over her. The Government thus terminated a military status that was geographically restricted, with the consequence that, once her original conviction was set aside, she could not be subjected to further military proceedings.

The Court's contrary holding on this point accordingly does violence to over ninety years of military rulings repeatedly made and consistently followed.

B. Placing Mrs. Covert in Civilian Custody Precluded the Exercise of Further Military Jurisdiction Over Her by the Very Terms of the Uniform Code.

The Court said last June (351 U.S. at 491), "It would be unreasonable to hold that the services retained jurisdiction of military prisoners that they kept in foreign countries but lost jurisdiction of prisoners confined in penal institutions in the United States."

And the Government in October argued (U.S. Memo. 13) that "When the Air Force returned Mrs. Covert to the United States in custody for the execution of her sentence, it was demonstrating its purpose to maintain and assert its jurisdiction over her."

Even if it be assumed at this juncture for purposes of argument that simple return to the United States does not defeat the further exercise of military jurisdiction, it is still true that neither of the quoted statements can survive examination of the statute. For the terms of the Code make it perfectly clear that confinement in a civilian institution, such as was imposed on Mrs. Covert (R. 3-4, 8-9, No. 701), destroys further court-martial jurisdiction in any event.

Unlike the Articles of War, AW 2(c) of which, from 1916 on, subjected to military law "All persons under sentence adjudged by courts martial," the Code by Art. 2(7) is applicable only to "All persons *in custody of the armed forces* serving a sentence imposed by a court martial." [Italics added.] See Covert Br. 30-32, where numerous references are collected and the legislative history is set forth.

When the Air Force placed Mrs. Covert into civilian custody it lost further jurisdiction over her just as if it had placed a discharged airman into similar custody. And if it be urged that military custody is in fact unavailable for female military prisoners, then that circumstance, if it be one, is appropriate for and only for submission to Congress, which has made military jurisdiction while in confinement dependent, not, as in 1916 to 1951, on the kind of tribunal adjudging the sentence being served, but on the kind of institution in which that sentence is being served.

It is proper to point out that the present question does not arise in the case of military personnel. There a dismissal or punitive discharge cannot be executed until the completion of appellate review (Art. 71, UCMJ), with the result that, in the event of a reversal followed by a rehearing, military status is not destroyed. The question arises only when the processes of the Uniform Code of Military Justice are sought, as here, to be applied to civilians for whom, it is impossible to refrain from saying, they are so obviously unsuited and inappropriate.

In that situation, the provisions of the Code show on their face that any surrender of the civilian "military prisoner" to civilian custody destroys further military jurisdiction. Therefore, once Mrs. Covert's conviction was set aside, the Air Force, which for reasons of its own had transferred her custody to three separate civilian agencies, ceased to have any further power over her.

Art. 2(7), UCMJ. The only reason why habeas corpus was not sought immediately upon her transfer to Washington was because, until the District of Columbia Circuit was reversed in *Toth* v. *Quarles*, 350 U.S. 11, the provisions of Art. 3(a), UCMJ, were still valid within the District of Columbia, so that military jurisdiction over her could have been reasserted thereunder.

C. The Rationale of Last June's Opinion in the Krueger Case, Sustaining Military Trials of Accompanying Civilians Overseas, Is Patently Insufficient to Sustain the Covert Holding That Such a Trial Is Proper in the District of Columbia.

In the *Covert* case, the Court last June (351 U.S. at 491,492) spoke of "military jurisdiction" and of "military prisoners", and cited the decisions of "military courts" in deciding that Mrs. Covert could be retried by a court martial in the District of Columbia. But the holding in *Covert* was expressly (351 U.S. at 488) rested on the *Krueger* decision, and the latter opinion was at pains (351 U.S. at 476) not to inquire into the extent of the Congressional power "To make Rules for the Government and Regulation of the land and naval Forces." Rather, the *Krueger* holding was that the Constitution did not require trial in a foreign country before a court conforming to Article III for offenses committed there by an American citizen, that Congress might establish legislative courts for that purpose, and that Congress could accordingly employ the existing system of courts-martial, without trial by jury, since similar procedures had been approved in other types of legislative courts established abroad.

That reasoning falls down completely when applied, as in the *Covert* case, to a trial by court-martial in the District of Columbia. For there the guarantee of jury trial applies in full force (*Callan* v. *Wilson*, 127 U.S. 540; *District of Columbia* v. *Colts*, 282 U.S. 63; *District of*

Columbia v. *Clawans*, 300 U.S. 617), and the courts of the District of Columbia, after a long period of uncertainty, have finally been held to be constitutional Article III courts (*O'Donoghue* v. *United States*, 289 U.S. 516).

Therefore, under the assumption underlying the present point, the circumstance that Ross of *In re Ross*, 140 U.S. 453, was properly tried overseas by a consul without a jury for violation of R.S. § 5339, does not mean that, if he had been returned to the United States before the proceedings against him had been completed, he could similarly have been tried by a consul in this country. Such an extension of the *Ross* doctrine would render meaningless within the United States the jury trial guarantees of the Constitution. And it is submitted that a similar extension in the *Covert* case of a military jurisdiction whose military basis is expressly put to one side would likewise nullify completely one of the most solemn of all constitutional protections.

Yet, if the Court's *Covert* opinion is permitted to stand undisturbed on this rehearing, then, within a very short time thereafter because the Air Force is determined to retry Mrs. Covert (*supra*, pp. 129-130), there will be presented the spectacle of a civilian woman on trial before a military tribunal in the District of Columbia, within the very shadow of the Capitol dome.

That will be the first such trial since that of Mrs. Surratt—which is hardly a pretty precedent, or one of which any American can be proud. But whereas, in that case the authorities responded to the service of a writ of habeas corpus by presenting to the judge an Executive Order which suspended the privilege of the writ (Moore, *The Case of Mrs. Surratt*, 58; Pitman, *The Assassination of President Lincoln and the Trial of the Conspirators*, 250), in this instance they will be proceeding with the full approval of the highest court in the land.

What President Wilson said (*supra*, p. 53) of a similar proposal to extend military jurisdiction in the midst of a declared war seems equally applicable to such a course sought now to be justified because of a cold war:

> "I think that it is not only unconstitutional; but that in character it would put us upon the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America . . ."

CONCLUSION

The military jurisdiction over civilians that is involved in these cases cannot be supported as a proper exertion of constitutional power. Its present exercise not only violates express provisions of the Constitution, it is violative as well of every American tradition since the beginning.

The judgment in No. 701 should therefore be affirmed, and that in No. 713 should be reversed, with instructions to discharge Mrs. Dorothy Krueger Smith from custody forthwith.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.
Washington 6, D. C.,
Counsel for Appellee and Respondent.

JOHN G. MORRISON,
305 Morrison Building,
Charleston 24, W. Va.,

ADAM RICHMOND,
7816 Glenbrook Road,
Bethesda 14, Maryland,
Of Counsel for the Respondent.

FEBRUARY 1957.